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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
SALLIE E. HILLMON.
Respondent.

663

PETITION FOR CERTIORARI.

GILBERT E. PORTER.
WILLIAM G. BEALE.
JAMES W. GREEN.
EDWARD S. ISHAM.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

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Petitioner,

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SALLIE E. HILLMON.
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TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Connecticut Mutual Life Insurance Company, a corporation organized under the laws of the State of Connecticut, respectfully represents unto your Honors as follows:

1.

Statement.

On the 13th day of July, 1880, the respondent filed, on the law side of the Circuit Court of the United States for the District of Kansas, her certain petition seeking

to recover from your petitioner the sum of $5,000 upon a policy of insurance No. 153,614 alleged in said petition to have been issued by your petitioner on March 4, 1879, upon the life of John W. Hillmon, the husband of the respondent, in which she was named as beneficiary. The respondent in her petition further alleged that both she and the insured had fully complied with all of the terms of the policy, and that the insured had died on the 17th day of March, 1879, and that due proofs of death had been forwarded to the company.

In defense to said suit your petitioner first denied the allegations set forth in respondent's petition; and as a second defense charged as follows:

> "2nd. Said defendant further answering, says that on and before the 30th day of November, A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons, to the defendant unknown, unlawfully and fraudulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillmon, to-wit, in the New York Life Insurance Company, by its policy numbered 134,418 and dated November 30th, 1878, for the sum of ten thousand dollars; in the Mutual Life Insurance Company of New York, by its policy numbered 195,132 and dated Dec. 10th, 1878, for the sum of ten thousand dollars; and in the Connecticut Mutual Life Insurance Company, by its policy numbered 153,614 and dated March 4th, 1881, for the sum of five thousand dollars.
>
> That thereafter and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin did falsely and fraudulently pretend and represent unto this defendant and others that said Hillmon was dead and did, on or about the months of March and April, A. D. 1879, and thereafter, for the purpose of securing the payment of

said policies and obtaining the money thereon, falsely and fraudulently claim, pretend and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the said John W. Hillmon; whereas said John W. Hillmon was not and is not dead; that since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consummating the conspiracy entered into as aforesaid." (*Rec.*, 18.)

As a third defense petitioner set up a release by respondent of all claims against petitioner under said policy.

Respondent, in reply, denied the allegations in petitioner's amended answer and charged that the release aforesaid had been obtained by fraud and without consideration, and was void.

Shortly before the issuance of said policy by your petitioner, the New York Life Insurance Company and the Mutual Life Insurance Company of New York each issued a policy for ten thousand dollars upon the life of said John W. Hillmon, made payable to respondent as beneficiary, and after the alleged death of the insured, and at about the time of the institution of this suit, the respondent began separate actions at law in the Circuit Court of the United States for the District of Kansas against each of said Insurance Companies to recover upon the policies aforesaid. Thereafter, on the 14th day of June, 1882, an order was entered in each of the three suits consolidating them for trial, to which action of the court the petitioner and each of the other defendants excepted. (*Rec.*, 25.) Two trials of the three consolidated causes

resulted in disagreements by the jury. On the 29th day of February, 1888, judgments in each were rendered for the plaintiff, which upon writs of error were reversed by the Supreme Court of the United States, and the cases were remanded for new trial (145 U. S., 285). After two more trials of the consolidated causes each resulting in a disagreement by the jury, a compromise was effected between the plaintiff and the New York Life Insurance Company, which resulted in a dismissal of the suit against that company. (*Rec.*, 61.) Thereafter, on the 16th day of October, 1899, an order previously entered consolidating the two remaining suits for trial was continued in force over the objection of each defendant (*Rec.*, 70), and the consolidated causes again came on for trial, resulting in separate judgments for plaintiff against the Mutual Life Insurance Company of New York, and against petitioner. To reverse this latter judgment petitioner sued out a writ of error from the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and upon a hearing in that court before Judges CALDWELL, SANBORN and THAYER the judgment was, on the 2nd day of April, 1901, affirmed by a divided court, Judge SANBORN rendering a dissenting opinion.

2.

Right of Challenge.

At the trial of 1888, after the three causes had by order of court again been consolidated for trial, each defendant upon the impaneling of a jury claimed the right to challenge three persons peremptorily, which claim was, however, denied, and the court ruled that but three per-

emptory challenges could be exercised by the three defendants as a whole. (*Rec.*, 41.) Thus was presented the question which upon writ of error was adjudged by this court in the cases of *Insurance Cos.* v. *Hillmon*, 145 U. S., 285, and the judgments in favor of the plaintiff below were reversed. In delivering the court's opinion Mr. Justice Gray said:

> "But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately. Section 819 of the Revised Statutes provides that in all civil cases 'each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section.' Under this provision, defendants sued together upon one cause of action would be entitled to only three peremptory challenges in all. But defendants in different actions cannot be deprived of their several challenges, by the order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together. The denial of the right of challenge, secured to the defendants by the statute, entitles them to a new trial."

Upon the impaneling of a jury at the last trial, after the court had renewed the order consolidating this suit with the suit instituted by respondent against the Mutual Life Insurance Company of New York over the objection of each defendant, the following appears in the record:

> "And thereupon, in the progress of the impaneling of the jury, when twelve men had taken their

seats in the jury, who were qualified to serve as jurors in the trial of said causes, the court said: 'It is my opinion that the plaintiff has six peremptory challenges and each of the defendants three.'

To which statement and ruling of the court the defendants and each of them then and there duly excepted.

And thereupon the parties proceeded to exercise their peremptory challenges." (*Rec.*, 136.)

There being two cases, the plaintiff thereupon demanded and was allowed to exercise over the objection of the defendant six peremptory challenges to the one single jury to which the defendant in each case was allowed but three, so that in the present instance the petitioner, The Connecticut Mutual Life Insurance Company, was compelled to try its separate case before a jury to which it was given the right of but three peremptory challenges, while the plaintiff was given the right of six peremptory challenges to the same jury. Judge THAYER, in delivering the opinion of the Court of Appeals upon this branch of the case, said:

"It is urged, however, by learned counsel for the defendant, that as the two actions were consolidated for trial the plaintiff was only entitled to three peremptory challenges. It is to be observed that when this case was before the Supreme Court and was under consideration in the case last cited (145 U. S., 285) that court held that when actions are consolidated such an order does not operate to deprive either defendant of the right to challenge as many jurors peremptorily as he would have been entitled to challenge if the cases had been tried separately, and the former judgment in favor of the plaintiff was reversed because each defendant to the consolidated cause was not allowed three peremptory challenges. If this rule is applied to the defendants, that is to say, if consolidated causes are treated separately so far as the defendants are concerned for the purpose

of preserving to them their respective rights of challenge, we perceive no reason why the same rule should not be applied to the plaintiff so as to entitle her to the same number of challenges which she would have been entitled to had the cases been tried separately. The learned judge of the trial court acted in accordance with this view, and in so doing we think that he committed no error. It certainly does not appear that the defendant company was prejudiced by permitting the plaintiff to have six peremptory challenges and the defendants three challenges each or six in all."

The Circuit Court in permitting plaintiff to exercise to the same jury twice as many peremptory challenges as the defendant in either case, and the Court of Appeals in affirming that decision, have misconstrued and have failed to give proper effect to the decision rendered by this court upon the former hearing of this case, and by consolidating the two suits over the objection of defendant, and by permitting plaintiff to exercise six peremptory challenges, the Circuit Court conferred upon the plaintiff a right and privilege which she could not have enjoyed if a separate trial had been permitted defendant, and at the same time subjected the defendant to a disadvantage which it would not have incurred if it had been allowed a separate trial, upon which alternative it insisted. *Under the foregoing judgment of this court, no single party in any of the consolidated causes is given more than the stututory number of challenges to the same jury.* Petitioner insists that the rulings of the courts below are inconsistent with the principles recognized and established by this court in that judgment, and by the entire body of adjudications touching the subject, the citations of which are presented in the argument submitted in support of this petition. For these reasons, and because a part of

this general question has already been before and received the consideration of this court, and because the rulings of the courts below seem not to be in conformity with the principles by this court established, and because the question itself is one of general application and of great gravity, your petitioner is advised by counsel, and believes, that the decision of the Circuit Court of Appeals ought to be reviewed and said question be finally settled by this court through a writ of *certiorari* herein to said Court of Appeals.

3.

Defense of Conspiracy and Fraud.

The pleadings of the defendant were *designed* to present three defenses, with two of which we are now specially engaged; *one* a general traverse which included a denial that Hillmon *was dead*, and a denial that the corpse presented was his. The *other* a charge of conspiracy to defraud the defendant, which included the procurement of the insurance upon Hillmon for the benefit of his wife, with the *undisclosed purpose* of collecting the insurance by a false pretense of the death of Hillmon and the presentation of a fictitious body as his.

(1) The first defense involved the identity of the body presented as Hillmon's; and the *fact of a conspiracy would have bearing as evidence on that*, for if the identity were otherwise uncertain, the existence of such conspiracy and purpose would increase the probability that the corpse was fictitious.

(2) The subject-matter of the second plea, namely the charge of conspiracy to defraud the defendant, and

the various proceedings in execution of that fraudulent purpose and conspiracy, were associated with a specific provision of the contract of insurance which is given below.* The assignments of error accordingly presented the subject-matter of this second plea in their assertion of its legal effect in at least three aspects, differing from each other merely in their scope and in modifications of outline. They insist:

(*a*) That the existence of the fraudulent purpose and conspiracy, averred by the second defense, and the procurement, receipt and acceptance of the contract as steps in execution of that purpose, in legal effect made the contract void *ab initio*, so that no recovery could be had thereon by anyone claiming thereunder. (Assignment 89. *Rec.*, 1998.)

(*b*) That if, after the procurement of the contract of insurance under the conditions and with the purpose aforesaid, the parties *entered upon the execution* of the fraudulent scheme, the said contract was void for the fraud, and no right of action could be based nor any recovery had thereon, even if it should be true that while actually engaged in the prosecution of the fraudulent and unlawful purpose, or in preparation therefor, the insured did in fact come to his death. (Assignments 88, 92; *Rec.*, 1997, 1999.)

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* "1st. That the contract between this company and the insured is wholly expressed and contained in this policy, and the application therefor, which is a part of said contract, and a copy whereof is hereto annexed, and that the several answers contained in or endorsed upon the said application, are warranted by the insured and assured to be true in all respects, and *that if this policy has been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same shall be absolutely null and void.*" (*Rec.*, 6.)

(c) That if before the institution of this suit the plaintiff below came to know that the policies of insurance had been so fraudulently procured and with such intent and purpose, and that they had been received and accepted in execution to that extent of such fraudulent design, and that the persons so conspiring together proceeded further in execution of said design, and that the corpse presented was falsely represented to be the body of Hillmon, then by the institution of this suit she thereby adopted and made in legal effect her own all the acts performed by the conspirators in furtherance of the unlawful conspiracy with like legal effect as to her as if she had been one of the parties originally conspiring. (Assignments 87,91. *Rec.*, 1997, 1999.)

It is obvious, therefore, that in legitimate support of the defenses presented by the pleadings, it was important to the defendants in the several cases to establish the unlawful and fraudulent purpose and the conspiracy therefor averred in their plea.

That a *prima facie* case of fraud and conspiracy was established by the evidence offered was recognized by the Circuit Court in its charge to the jury. It instructed them that they might consider the evidence bearing upon the fact of such conspiracy; but it limited the application by the jury of the *fact* of such a conspiracy, if it should find one from the evidence, to its bearing upon the identity of the corpse presented, as tending to increase the probability that the corpse so presented was fictitious. The charge to the jury contained the following:

> "If you believe from the evidence that John W. Hillmon, Brown and Baldwin did conspire as charged by the defendants and, pursuant to such combina-

tion, the policies of insurance were obtained, and that Hillmon did not die in March, 1879; that is to say, that it was not the body of Hillmon that was brought to Lawrence in the early days of April, 1879, then your verdicts should be for the defendants. Even if you should find that there was no lawful conspiracy or fraud or fraudulent intent as charged by the defendants, but should further find that the body brought to Lawrence as aforesaid was not the body of Hillmon, your verdicts in such event should be for the defendants. In other words, it is not necessary for defendants to prove a conspiracy or fraud or fraudulent intent in order to defeat a recovery. On the other hand, even if you should find that there was a conspiracy between the three men, as charged by the defendants, but should also find that Hillmon died in March, 1879, and that it was his body that was brought to Lawrence as I have stated, your verdicts in such event should be for the plaintiff and against the defendants. In other words, the existence or non-existence of the conspiracy is not the controlling question in the case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, then it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse." (*Rec.*, 1921.)

The opinion of the Circuit Court of Appeals upon this question will be found in the appendix at pages 33–38 *post*.

By effect of this language in its charge, and its r
to give the instructions upon this subject speci
to each of which exceptions were taken by the defendant (Rec.)
asked by the defendant, the Circuit Court denie
excluded from the case the defense presented by th
ond plea of the defendant, as stated in the three specifi-

cations above given. The subject-matter of the second plea, namely, the fact of fraudulent purpose and conspiracy as a defense to the contract of insurance making it void, was excluded by the Circuit Court and by the Circuit Court of Appeals, and apparently upon these two grounds: first, that plaintiff, the beneficiary under the policy, was not affirmatively charged in pleading as one of the co-conspirators, and second, because the plea inadequately presented as a defense the combination to procure the policy for the undisclosed purpose of fraud, and was insufficient to advise the plaintiff that she would meet defense of that character. The assignments of error involved your petitioner's claim of right to present the fraudulent purpose and conspiracy, charged in said second plea, as a substantial defense to said contract of insurance making it void for fraud.

Your petitioner is advised by counsel that the above ruling by the Circuit Court and by the Circuit Court of Appeals in effect deprives your petitioner and all other insurance companies of the right to interpose the defense of fraud in the procurement of a policy, unless the beneficiary named in said policy is charged and can be proved to have participated therein. Your petitioner avers that such ruling is in conflict with former decisions of this court, and with decisions of the Circuit Court of Appeals for other circuits, the citations of which will be found in the argument filed in support of this petition, and that the question is one of general jurisprudence, and of such gravity, importance and frequent occurrence as to justify a review of the decision of said Circuit Court of Appeals by this court.

4.

Exclusion of Conspiracy Evidence.

If it was the right of the defendant to establish in legitimate support of its defenses the unlawful purpose and conspiracy alleged in the plea against the plaintiff *at all*, which cannot be doubtful, and is for one purpose conceded, it was then its right in doing so to proceed under all the rules of evidence applicable to the introduction of proof upon that subject. Having established in the court below a *prima facie* case of conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin, defendant offered to prove by the witnesses E. D. F. Phillips, J. H. Blythe, James S. Crew and Alexander Carr certain acts and declarations of Baldwin, one of the alleged co-conspirators, in contemplation of and preparation for the fraudulent purpose and the conspiracy for its consummation, and some of them in furtherance of its execution. (*Rec.*, 1603–1619, 1809.) Because the plaintiff was not charged as a co-conspirator, the Circuit Court excluded the evidence, and in that connection said:

> "The acts and the declarations of the conspirators are not admissible for the purpose of establishing the conspiracy; but the conspiracy having been established and a *prima facie* case made, then the declarations or the acts of one conspirator are admissible, *not against a party who is not a party to that conspiracy, but as against each other*, and that upon the theory that the acts and declarations of one of the conspirators are pursuant to the conspiracy, and they must be within those lines; they must be in aid of the conspiracy; then the acts and the declarations of one conspirator in aid of the carrying out of the conspiracy are evidence against the others, *and the application of that would be confined*

necessarily to a proceeding against one of the conspirators, or a proceeding in which one of the conspirators was a party. Consequently I believe that the declarations of Levi Baldwin have no proper place in this case." (*Rec.*, 1611.)

Judge THAYER, in delivering the opinion of the Court of Appeals, said:

"But for other reasons as well the testimony was not admissible against Mrs. Hillmon, who was the sole plaintiff. It was not alleged by the defendant company that she ever became a party to the alleged combination to defraud certain insurance companies, either by originial participation in the scheme or by subsequently adopting it, and in the absence of any such averment we are of opinion that it would have been erroneous to have admitted as against *her* such casual declarations and inquiries of the man Baldwin as are above described. Under the issues which were presented by the pleadings we think that the trial court went quite far enough in permitting the existence of the alleged conspiracy between Hillmon, Brown and Baldwin, to be shown for the purpose of strengthening the probability that Hillmon was not in fact dead but was concealing himself. The existence of the alleged conspiracy was a single isolated fact which the jury might have regarded as having some probative force in solving the real issue in the case as to whether Hillmon was accidentally killed at the time and place alleged in the complaint."

And upon the same subject Judge SANBORN, in his dissenting opinion, said:

"The contention that this testimony constituted no evidence against the plaintiff because she was not alleged to be a party to the conspiracy does not seem to me to be sound. There was sufficient evidence of a conspiracy to obtain this policy to defraud the company to warrant the court in submitting this testimony to the jury. If the conspiracy was formed and the policy was obtained by John W. Hillmon, one of the conspirators, in pursuance of a

plan that he formed to defraud the company, any assignee or beneficiary of the policy necessarily took it subject to its original defect, and any evidence competent to show that it was originally obtained by fraud must be competent against anyone who holds it, for the policy still has that defect in the hands of the assignee or beneficiary. *National Life Ins. Co.* v. *Minch*, 53 N. Y., 144; *Carpenter* v. *Ins. Co.*, 1 Story, 57; *Burruss* v. *National Life Ass'n.*, 32 S. E., 49; 1 Biddle on Ins., 448–9."

It was conceded by the Circuit Court that the alleged conspiracy might be proved so as to be used as evidence against the plaintiff as bearing upon the identity of the corpse presented. Evidence sufficient to make the *prima facie* case, which is a preliminary condition to the admission of the independent acts or declarations of co-conspirators against each other, was supplied to the satisfaction of the trial court. The right to supplement and reinforce the evidence already in followed of necessity. The proof, sufficient in the mind of the court to make the *prima facie* case, might not dispense in the minds of the jury with the importance of the confirmatory evidence which the defendant had become entitled to introduce. It was the fact of the conspiracy that was admissible in evidence against her, and the fact of the conspiracy itself being admissible against her involved the subordinate conclusion that all lawful evidence establishing that fact was of necessity equally admissible. The evidence offered and rejected was evidence of the fact of the conspiracy, which was itself the fact held admissible against the plaintiff. Acts and declarations, therefore, admissible to establish the conspiracy between the co-conspirators were admissible in establishing the *fact* which was admissible against the plaintiff. Whether these matters of evidence were admissible against the plaintiff or not was logically

involved in the prior determination that the fact of conspiracy was admissible against her at all. A jury not convinced by the *prima facie* case recognized by the court might well have been convinced by the evidence that was excluded of the acts and declarations of one of the co-conspirators.

Your petitioner is advised by counsel that the decision of the Circuit Court in excluding this evidence, and the affirmance of that decision by the Circuit Court of Appeals, are not in accordance with the decisions of the Supreme Court of the United States, and particularly the rulings of this court in the former case between these parties, reported in 145 U. S., 285, or of the Supreme Court of Kansas, and the universally established rules of evidence upon this question, as stated in the argument filed in support of this petition, and for these reasons, and because the question itself is one of general jurisprudence and of gravity and importance, your petitioner is advised by counsel, and believes, that the decision of the Circuit Court of Appeals ought to be reviewed by this court.

5.

Brown Affidavit.

After the supposed death of John W. Hillmon, John H. Brown, one of the alleged conspirators, on the 4th day of September, 1879, made a sworn statement in writing, in which he stated that he, with John W. Hillmon and Levi Baldwin, had conspired to defraud the Insurance Companies by procuring insurance policies upon Hillmon's life, with the view to collecting said insurance by palming off upon the Insurance Companies a dead

body, falsely pretending it to be that of Hillmon; and that the body presented in these cases by the plaintiff was not the body of Hillmon, but a false body procured and presented in pursuance of that conspiracy. (*Rec.*, 1284–6.)

The plaintiff on the trial below read in evidence the deposition of John H. Brown, wherein he stated, in substance, that the above affidavit made by him was false. Subsequently, during the cross-examination of a witness called by defendant, the plaintiff offered this affidavit in evidence, generally and without any limitations upon its scope, and it was so admitted without objection from defendant. (*Rec.*, 1284.)

The defendant below requested the court to give the following instruction:

> "No. 44. The jury are instructed that the statement signed and sworn to by John Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness." (*Rec.*, 1914.)

The court refused to give this instruction, to which refusal defendant duly excepted (*Rec.*, 1914), and in lieu thereof instructed the jury as follows (*Rec.*, 1923):

> "The deposition of John H. Brown was read to you on behalf of the plaintiff. On behalf of the defendants evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you. The oral declarations of said Brown not under oath, and the statement signed and sworn to by him, are

> not affirmative evidence of the truth of any matter therein contained or mentioned, and they should not be considered by you excepting as affecting the credibility of the evidence of the said Brown given in his deposition, and in determining this matter of credibility you should consider the testimony of both sides, showing the circumstances under which Brown made said declarations and statement, as well as all other evidence bearing on that question."

After having requested the court below to give the above instruction embodying what the defendant deemed to be a correct application of the law to the question of the weight to be given the Brown affidavit, so offered in evidence by the plaintiff herself, and after having duly excepted to the court's refusal to give the same, it was not necessary for the defendant, in order to preserve the exception, to again except to that portion of the court's charge which embodied a contrary statement of the law. Such had been the rule of the Circuit Court of Appeals for the Eighth Circuit announced in the case of *Long-Bell Lumber Company* v. *Stump*, 86 Fed., 574; 30 C. C. A., 260.

Judge THAYER, in delivering the opinion of the Court of Appeals, said, with reference to the objection sought to be raised in that court by the petitioner:

> "We are *relieved, however, of the necessity of deciding* whether there was anything misleading in the excerpt from the charge which has been quoted above, by the fact *that no exception was taken thereto*, and we may reasonably infer from the fact that no exception was taken, that the direction given by the court that Brown's sworn statement to the defendant's attorney was not '*affirmative evidence*,' etc., was not deemed to be of much importance or as liable to mislead, when the case was submitted to the jury."

In the case of *Long-Bell Lumber Co.* v. *Stump*, *supra*, the majority of the court, viz., Judges SANBORN and PHILLIPS, concurred in a rule directly opposed to the rule asserted by the majority of the court, viz., Judges CALDWELL and THAYER, in the present case, Judge SANBORN adhering to his opinion in the former case, and dissenting in the present case. It is thus apparent that if by any contingency, as might well have happened through illness or otherwise, out of the various judges entitled to sit in and compose the appellate court, there had been a single change in its constitution [as, for instance, if Judge PHILLIPS had been sitting in the place of Judge CALDWELL or Judge THAYER] the decision would probably have been different.

In his dissenting opinion upon this point Judge SANBORN said:

> "A perusal of this brief statement of the record upon this subject will not, it seems to me, raise a doubt in the mind of any reader that the question presented by the request, that ruled by the charge and that decided by the refusal to grant the request was the single question whether or not the affidavit of Brown was any evidence of the facts it recited. This, it seems to me was the only question intended to be raised by the request, was the question which the charge clearly shows that the court understood was presented and was the only question ruled either by the refusal of the request or by the terms of the charge upon this subject. If this view is correct, the exception to the refusal to grant the request fairly presents the ruling upon this issue.
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> * * * * *
>
> The request and the charge seem to me to fairly present one and only one question which was clearly understood and directly ruled by the court both in its charge and in its refusal to grant the request, the question whether or not

the affidavit was evidence of the facts it recited. In the light of the charge, which contradicted the terms of the request, the refusal of the request ruled this question as directly as the charge itself, and for that reason the exception to the refusal fairly challenged the error and entitled the defendant to a review of the ruling.

When we turn to a consideration of the correctness of the ruling itself no issue is presented for argument or consideration. Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give to the opposing party the opportunity and right of cross-examination and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiesence in the introduction of testimony and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of such evidence have this effect for he who introduces testimony is ordinarily in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence and the defendant consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited because the defendant relied, and had the right to rely upon it for that purpose and because the plaintiff having introduced it was not permitted to take the inconsistent position that it was not competent evidence of the facts it related. *Walton* v. *Chicago, St. P., M. & O. Ry. Co.*, 56 Fed., 1006, 1008; 6 C. C. A., 223, 225; 12 U. S. App., 511, 513; *National Loan & Investment Co.* v. *Rockland*, 94 Fed., 335, 337; 36 C. C. A., 370, 372. The affidavit was peruasive telling evidence upon the crucial questions in the case, upon the identity of the corpse and upon the conspiracy to defraud the defendant, and yet the company was deprived of its benefit by this ruling of the court. This error is so plain and glaring, and it necessarily deprived the defendant of such important testimony that in my opinion it ought not to be disregarded."

It is obvious, therefore, that upon this subject the rule of procedure in the Eighth Circuit is unsettled and uncertain. We do not understand the suggestion that exception to the language of the charge was omitted because the matter "was not deemed to be of much importance or as liable to mislead." The importance of the issue to the plaintiff is vividly illustrated by the language in the dissenting opinion just quoted; and the point had been under the rules of the court then in force effectively preserved by the careful request of an instruction and exception to its refusal. It is obvious that whether one rule of procedure or the other should determine the right of your petitioner has depended not upon any principle or rule settled in that circuit, but upon mere hap and chance in the composition of the court; so that the rule announced one day upon which litigants are presumed to rely is announced to be otherwise on another day, and they are caught in a situation where their gravest interests are involved and overturned and into which they are presumably led by following a path declared by the court to be legitimate and correct.

Your petitioner is advised by counsel that the Circuit Court of Appeals, in refusing to consider and adjudicate the question thus presented by that portion of the charge of the Circuit Court above set forth, has failed to observe a rule of practice which had been established by a former decision of that court; and because the petitioner has been drawn into its present position by its conformity to the rule in force at the time of the trial, and because the decision in this case has made that rule of practice uncertain in that circuit, your petitioner believes that the decision of the Circuit Court of Appeals ought to be reviewed and that the question so presented should be adjudicated by this court.

6.

Impeachment of the Release.

After the alleged death of John W. Hillmon on March 17, 1879, and after the beneficiary under the policy had seen the corpse produced as the body of the insured and had been informed by John H. Brown that he had made the sworn statement, known as the "Brown affidavit" (which is the document already referred to in paragraph 5), the beneficiary executed and caused to be delivered to your petitioner in Kansas the following release (*Rec.*, 585):

> "LEAVENWORTH, Kansas, Sept, 15, 1879.
>
> In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the Connecticut Mutual Life Insurance Company by reason of policy No. 153,614, issued by said company, dated March 4th, 1881, and for the sum of five thousand dollars, on the life of my husband, John W. Hillmon, and hereby enter satisfaction in full, and order the dismissal of any and all suits or proceedings commenced or that hereafter may be commenced, by any person in my behalf, for the collection of the same.
>
> (Signed) SALLIE E. HILLMON."

Attest:
W. J. BUCHAN,
JOHN H. BROWN.

This release was specifically pleaded by defendant as a defense in the court below. Plaintiff, in her reply, alleged that the release was void for want of consideration and because obtained through fraudulent inducement and representations. (*Rec.*, 18–19, 20–22.) Upon the trial below, in the course of the direct examination of J. W. Green, one of the witnesses called by plaintiff, the release

was offered in evidence by the plaintiff herself without any limitation of purpose and was admitted without objection from defendant. Nevertheless both before and after the actual offer of the instrument in evidence, the plaintiff sought to introduce testimony to avoid and impeach the release for asserted want of consideration and for fraud in procuring it. To the introduction of such evidence the defendant repeatedly and persistently interposed objections on the ground that the evidence was *incompetent*, irrelevant and immaterial. (*Rec.*, 576–580.) After these repeated objections had again and again been overruled by the court, and in order not to unnecessarily encumber the record, the defendant interposed a general objection to all evidence of this character in the following manner:

> "Q. Now, then, I will get you to state to the jury what conversation there was at that time between you and Mr. Munn and Mr. Buchan as to giving him this kind of an instrument?
>
> The defendants object to the question as *incompetent*, irrelevant and immaterial, and desire it understood that all testimony upon this subject is under their objection. The court overruled the objection, to which action and ruling of the court the defendants at the time duly excepted and still except." (*Rec.*, 580.)

This release was executed and delivered in the State of Kansas, and the following are sections of chapter 21 of the Statutes of Kansas of 1868, at page 183:

> "Section 6. The use of private seals in written contracts (except the seals of corporations) is abolished, and the addition of a private seal to an instrument of writing shall not affect its character in any respect.
>
> Section 7. *All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney, shall import a consideration.*

> Section 8. The want or failure, in the whole or in part, of the consideration of a written contract, may be shown as a defense, total or partial, as the case may be, in an action on such contract, brought by one who is not an innocent holder in good faith."

By force of this statute the contract of release executed by the plaintiff below imported a consideration and became in legal effect, under the law of Kansas, the equivalent of a contract under seal, at common law, as shown in the argument filed in support of this petition.

The rule of law is well settled by this court that in an action upon a sealed instrument *in a Federal court of law*, the defense of failure of consideration or of fraud in the consideration for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed. Such defense is equitable in character, and, to be made available against an instrument under seal, that is, an instrument importing a consideration, resort must be had to the courts of equity. The law is equally well-settled by this court that state statutes like section 8 of that of Kansas above referred to, which authorize such an equitable defense to be interposed in an action *in the state courts* upon any contract executed in that state, do not confer such power upon the courts of the United States as is shown in the argument filed in support of this petition.

In spite of these well-established principles of law, the Circuit Court permitted the plaintiff to introduce evidence over the objection of defendant for the purpose of impeaching for fraud and want of consideration an instrument which, by the Kansas statute, is made equivalent to a contract under seal, at common law, and which could only be attacked in the Federal courts by a proceeding in equity.

Your petitioner assigned as error in the Court of Appeals the admission of this evidence by the Circuit Court, and argued the question in full both orally and in its brief, but the objection of your petitioner was overruled. Such ruling by the Circuit Court and its affirmation by the Court of Appeals are a direct impalement upon one horn or the other of a dilemma created by the decisions of this court, for they either hold that a contract importing a consideration may be impeached and avoided in a Federal court of law for want of consideration or because obtained by fraudulent inducement, which is in full contravention of direct adjudications of this court upon that point; or they hold that state statutes conferring such power upon state courts operate equally to confer it upon Federal courts sitting in such states, which is equally in full contravention of direct adjudications of this court upon that point. It is submitted that after the plaintiff in the Circuit Court had admitted the execution of the instrument by her pleading, and had herself voluntarily introduced it in evidence and had testified that she had executed and delivered it, she was absolutely concluded thereby in this action at law, and could set up no claim of right as against it; and the court should not have admitted any evidence impeaching the release, and at the conclusion of the plaintiff's case should have sustained the demurrer of the defendant to the evidence (*Rec.*, 836, 854), and, as requested by the defendant, should in its charge have instructed the jury to find a verdict for the defendant (*Rec.*, 1910).

Your petitioner is advised by counsel that the Circuit Court, in admitting this evidence over the objection of defendant, and the Court of Appeals in affirming the judgment, appear to have proceeded in direct contravention of

the decisions of this court, and the rules of law established thereby, as above set forth, and as shown in the argument filed in support of this petition, and for these reasons your petitioner believes that the decision of the Circuit Court of Appeals ought to be reviewed by this court.

7.

Lapse of Time not Evidence.

Hillmon paid the first premium upon the policy when issued, and this kept it alive for a certain period when by its terms the insurance would expire for non-payment of further premium. (*Rec.*, 147, 153.) Plaintiff had no right of action upon the policy unless Hillmon died before that date. Proof of his prior death was an essential and vital element of her case. In her pleading she alleged that he died March 17, 1879, at Crooked Creek from a gunshot wound inflicted by John H. Brown (*Rec.*, 15), and at the trial it was not contended that, if dead at all, he died at any other time or in any other manner. It was conceded that a man was killed by a gunshot wound at the time and place alleged, but it was denied that Hillmon was that man, and upon this branch of the case the question to be tried by the jury was one of identity. Plaintiff produced evidence tending to show that the man killed was Hillmon, and that it was his corpse which was found at Crooked Creek. Defendants on the other hand produced a volume of evidence tending to show that the man killed was *not* Hillmon, and that the corpse was not his, but was that of a man murdered by him *in pursuance of the fraudulent scheme* against the insurance companies. In this state of the evidence, the circumstance that Hill-

mon had not been seen nor heard from since March 17, 1879, became entirely immaterial as an evidentiary fact bearing upon the identity of the man killed at Crooked Creek. It no more tended to prove that he was dead than it tended to *prove his voluntary concealment because of his guilt and participation in the conspiracy;* for the absence was abundantly explained by the evidence of his fraudulent scheme against the insurance companies. The continued absence had no evidentiary weight one way or the other upon the question whether it was Hillmon or a victim of Hillmon's fraudulent scheme who was killed at Crooked Creek. It should have been given no weight in favor of either hypothesis. Defendants, therefore, asked the Circuit Court to give the jury the following instruction:

> "No. 28. The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case, for the reason that the real question in this case is, whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gunshot wound at the hands of one John H. Brown, at Barber County, on the 17th day of March, 1879." (*Rec.*, 1909.)

The court refused to do so, to which refusal the defendants duly excepted (*Rec.*, 1909), and charged the jury on this point as follows:

> "As bearing upon the question whether John W. Hillmon died as claimed by the plaintiff and whether it was his corpse that was brought to Lawrence, you are entitled to consider the fact, if it be one, that he has not been seen nor heard from alive since the 17th or 18th of March, 1879, at which time it is claimed he was killed. The unexplained absence of a person from his home and friends without being heard from, if continued for a sufficient length of time, may become evidence tending to show that he is dead, and it may be taken in connection with other evidence tending to show that he died at a certain

time and place. For some purposes, such as the settlement of estates and the like, the law adopts the presumption that an unexplained absence of seven years without tidings being received from the absent one is evidence of his death. The weight to be given to such continued absence depends upon circumstances. If it appears that a motive may exist for absence and a continuance thereof and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show death." (*Rec.*, 1920.)

Your petitioner assigned as error in the Court of Appeals the refusal of the Circuit Court to give this instruction, and argued the question in full both orally and in its brief. By that portion of its charge above quoted the Circuit Court in effect told the jury that Hillmon's continued absence since March 17, 1879, constituted evidence (to be considered in connection with the other evidence upon the point) tending to establish the essential fact that Hillmon died at *that particular time*, and that the motive, if any, for voluntary concealment was to be considered only in determining its *weight* as such evidence. Your petitioner is advised that the action of the Circuit Court in so charging the jury and in refusing to give the instruction above set forth, and the action of the Circuit Court of Appeals in affirming the judgment, were repugnant to the previous decision of said Circuit Court of Appeals in the case of *Northwestern Mutual Life Ins. Co.* v. *Stevens*, 71 Fed. Rep., 258, and to the decision of this court in *Davis* v. *Briggs*, 97 U. S., 628, and for this reason and because the question itself is one of gravity and general importance, your petitioner believes that the decision of the Circuit Court of Appeals ought to be reviewed and said question finally settled by this court.

* * *

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court, a full and complete transcript of the record, and of all proceedings of the said Circuit Court of Appeals in the said case therein, entitled *The Connecticut Mutual Life Insurance Company* v. *Sallie E. Hillmon*, No. 1,451, to the end that the said case may be reviewed and determined by this court, and that the said judgment of the said Circuit Court and the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

Your petitioner also prays that in case such writ be granted an order may be entered that the transcript of the record of the Circuit Court of Appeals herewith filed shall be taken and considered as a return to the writ.

And your petitioner will ever pray, etc.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

By GILBERT E. PORTER,
EDWARD S. ISHAM.
Its Attorneys.

GILBERT E. PORTER,
WILLIAM G. BEALE,
JAMES W. GREEN,
EDWARD S. ISHAM,
Of Counsel.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
COUNTY OF COOK.

Buell McKeever, being duly sworn, says that he is one of the attorneys and the agent in this behalf for the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true in substance and in fact, except as to the matters which are therein stated to be upon information and belief, and that as to those matters he believes said petition to be true.

BUELL MCKEEVER.

Subscribed and sworn to before me this fourth day of May, A. D. 1901.

WALTER J. GUNTHORP,
Notary Public.

[NOTARIAL SEAL.]

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS.

Eighth Circuit.

No. 1,451.—December term, A. D. 1900.

The Connecticut Mutual Life Insurance Company, *Plaintiff in Error*, vs. Sallie E. Hillmon, *Defendant in Error*. } In Error to the Circuit Court of the United States for the District of Kansas.

Mr. J. E. McKeighan and Mr. Edward S. Isham (Mr. Buell McKeever, Mr. J. W. Green, Hon. Shepard Barclay and Mr. M. F. Watts were with them on the brief) for the plaintiff in error.

Mr. C. F. Hutchings and Mr. L. B. Wheat (Mr. John H. Atwood was with them on the brief) for the defendant in error.

Before CALDWELL, SANBORN and THAYER, Circuit Judges

This is an action on a policy of life insurance in the sum of $5,000, which was issued March 4, 1879, on the life of John W. Hillmon, for the sole use and benefit of his wife, Sallie E. Hillmon, the plaintiff below and the defendant in error here. The case has had an eventful history. John W. Hillmon was killed, as it is claimed, on March 17, 1879, by the accidental discharge of a gun at a camp near Medicine Lodge, in a portion of Kansas which was then sparsely settled. The defendant company alleged fraud and refused to pay the policy, claim-

ing that Hillmon was still living and that the body produced as being his, was the corpse of another man, who had either been murdered by Hillmon or was a *cadaver* that had been found by him somewhere on the plains of Southwestern Kansas. The action was brought on August 19, 1879, and has been tried, as we are advised, six times before as many different judges and juries, resulting in a mistrial on each occasion except the last and a trial which took place in 1888, on both of which occasions the plaintiff below prevailed.

The defense to the action that was relied upon principally on the last trial is set forth in the defendant's answer, after a general denial of all of the allegations of the complaint, in the following language:

"2nd. Said defendant further answering, says that on and before the 30th day of November, A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons, to the defendant unknown, unlawfuly and fraudulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillmon, to-wit: in the New York Life Insurance Company, * * * the sum of ten thousand dollars; in the Mutual Life Insurance Company of New York, * * * the sum of ten thousand dollars; and in the Connecticut Mutual Life Insurance Company, by its policy, * * * the sum of five thousand dollars.

"That thereafter, and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin, did falsely and fraudulently pretend and represent unto this defendant and others that said Hillmon was dead, and did, on or about the months of March and April, A. D. 1879, and thereafter for the purpose of securing the pay-

ment of said policies and obtaining the money thereon, falsely and fraudulently claim, pretend and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the said John W. Hillmon; whereas said John W. Hillmon was not and is not dead; that since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consummating the conspiracy entered into as aforesaid."

In addition to the foregoing plea, the answer contained another plea to the effect that the plaintiff had released the cause of action sued upon, for a sufficient consideration, by a writing which was executed by her on March 4, 1881. To the plea of release the plaintiff replied, in substance, that it was obtained without consideration by fraud; and the facts constituting the fraud were specifically set forth.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

During the progress of the trial and in its final charge to the jury, the lower court ruled, in substance, that the defendant company had not averred in its answer that Sallie E. Hillmon, the sole beneficiary in the policy, was a party to the alleged conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin to defraud it and other life insurance companies; that as her connection with the conspiracy had not been averred it could not be claimed that she was a party thereto; that the substantive defense which was pleaded in the answer was, that Hillmon was not dead, for which reason no liability had accrued on the policy when the suit was filed; that the principal ques-

tion in the case was whether John W. Hillmon died, as claimed by the plaintiff, in consequence of a gunshot wound inflicted on March 17, 1879, and that the existence of the alleged conspiracy between Hillmon, Brown and Baldwin was only relevant to strengthen the probability that Hillmon was still living. In various ways exceptions were reserved to these rulings, which will collectively form the first subject for consideration.

It is manifest, we think, from an inspection of the answer, that the trial court was right in holding that the defendant had not pleaded that Mrs. Hillmon was a party to the alleged conspiracy between the three persons last above named, and such seems to have been the view that was entertained at the trial, by counsel for the defendant company, for, in his opening statement to the jury, after alluding to a remark which had been made by the plaintiff's attorney in his opening address, to the effect that the defendant had never claimed that Mrs. Hillmon was a party to any conspiracy—he said: "What evidence will be deduced on that point is for you gentlemen to determine; what we say on *paper* is that John W. Hillmon, Levi Baldwin and John H. Brown did conspire to defraud these insurance companies." This was an admission that the defendant had only charged in its answer that the three parties last named had conspired to defraud the company and that it had not ventured to commit itself to the statement that Mrs. Hillmon had ever participated therein.

It is further manifest that the trial court was right in holding that the fact that John W. Hillmon was not dead when the action was brought, but was concealing himself somewhere, constituted the substantial defense pleaded in that part of the answer which is quoted above; that

the issue tendered by the plea was whether he was dead or alive, and that such issue presented the principal question of fact for the consideration of the jury. It will not be presumed that the second plea contained in the answer was intended to state more than one defense, for which reason the first paragraph thereof, which alleges in effect that Hillmon, Brown and Baldwin had entered into a conspiracy to defraud certain insurance companies, among others the defendant, cannot be regarded as stating a substantive defense to the plaintiff's cause of action, but that averment must be treated as being merely introductory to the fact afterwards alleged that Hillmon was not dead. As we construe the plea, this latter allegation constitutes the defense on which the pleader intended to rely. We do not perceive, therefore, that the lower court committed any error in the several rulings last aforesaid, or in making the statement that the existence of the conspiracy between the parties named in the plea was not a controlling issue, but at most was only relevant in so far as its existence, if shown, might tend to strengthen the probability that Hillmon was still living. It was not only *not* alleged that Mrs. Hillmon ever became a party to the conspiracy, but, as we understand the contention of defendant's counsel, the evidence upon which they now rely to show her possible connection with the conspiracy is the fact that she saw the remains of the man who was shot near Medicine Lodge after they had been exhumed and brought back to Lawrence, Kansas, where the plaintiff resided. The argument is that as she saw the remains of the person who had been shot, not immediately after the occurrence, but at Lawrence, Kansas, some weeks after the alleged shooting, she *probably* discovered that they were not the remains of her

husband, and that by suing on the policy after she had made such discovery, she attempted to avail herself of the fruits of an existing conspiracy, and by so doing became a party thereto. It is obvious, however, that if she did make the supposed discovery, as counsel assume, and if the jury had been satisfied of that fact (*as they evidently were not*), then, as John W. Hillmon was *not* dead, her right to recover on the policy was defeated by the very evidence, and the only tangible evidence, as it seems, which is now depended upon to show that she adopted the conspiracy and became a party thereto after it was partially executed. The trial court was requested, however, to instruct the jury, in substance, that if the alleged conspiracy between Hillmon, Brown and Baldwin was entered into, and if Mrs. Hillmon was advised of that fact when the alleged body of Hillmon was brought back to Lawrence and she discovered that it was not the body of her husband, and if she thereafter brought the present action, then she adopted the conspiracy; and one complaint which is made by the defendant is that this instruction was not given. For reasons already sufficiently indicated no error was committed in refusing the request, however correct it may have been as an abstract proposition of law. The crucial question whether the body last above mentioned was the dead body of the plaintiff's husband or that of some other person *was* submitted to the jury, and the plaintiff's right to recover, so far as the second plea was concerned, was made to turn upon the finding upon that issue. The finding was against the defendant, the jury being satisfied, after listening to the testimoey of a multitude of witnesses, that Hillmon was dead and that the body which was returned to Lawrence was his body. Such being the

state of the case, it is obvious, we think, that as the material issue presented by the request was submitted, the defendant has no cause to complain of the refusal to submit the issue in the proposed form.

It is urged in behalf of the defendant, and an instruction embodying the proposition was refused by the trial judge, that if the policy in suit was taken out in pursuance of the alleged conspiracy between Hillmon, Brown and Baldwin, and if Hillmon was afterwards accidentally killed in the manner alleged by the plaintiff, while he was engaged in hunting for the corpse of some other person on the plains of Southwestern Kansas—then there could be no recovery. One good and sufficient reason why such an instruction ought not to have been given is that no such defense was pleaded in the answer. We have already expressed the opinion that the defense made by the second plea was in substance and legal effect that Hillmon was not dead and that the plea cannot be construed as containing dual defenses. Manifestly it ought not to be construed as containing two defenses which are inconsistent, the one denying that Hillmon was killed on March 17, 1879, and averring that he was still alive, and the other admitting that he was accidentally shot, as alleged. It is not necessary to assert that the two defenses were so utterly irreconcilable that they could not have been embodied in the same answer, but it is clear, we think, that if the defendant intended to rely on the defense which it actually pleaded and also on the one which was outlined in its instruction, they should have been pleaded separately so as to advise the plaintiff of the precise issues which she would be compelled to meet. A pleading, however skillfully framed, will never be construed by the courts, so as to mislead the unwary, but

will be interpreted according to its obvious sense and meaning. This action at the time of the last trial had been pending for more than twenty years, and if the long lapse of time and the fact that Hillmon had not been unearthed, had led the defendant company to suspect that he was in fact killed at the time and place alleged, then it should have amended its answer if it desired to avail itself of the defense which is suggested by the refused instruction—namely, that the policy was void because it was taken out originally in pursuance of a fraudulent purpose. We can not regard its second plea as embodying any such defense, or as having been framed by counsel with a view of presenting any such defense when the answer was filed. Aside from this view of the case we very much doubt, although it is unnecessary to express a definite opinion on the point, whether the fact that the policy was solicited in pursuance of the alleged conspiracy and with intent at some time in the future to make a fraudulent claim thereunder, would constitute a defense to the action brought by Mrs. Hillmon, who was not alleged to have been a party to the conspiracy when the policy was solicited or to have been in anywise concerned therein. The contract of insurance was founded upon a valuable consideration. It was not an unlawful contract. Mrs. Hillmon had a well-recognized insurable interest in the insured life, and it is not claimed that the policy was issued in consequence of any false or fraudulent representations. Under these circumstances it is not apparent that a mere intention on the part of John W. Hillmon to make a fraudulent claim thereunder, which was never in fact made, could impair the beneficiary's right of recovery. But, be this as it may, the instruction above referred to was properly refused.

This brings us to a consideration of some of the exceptions to the admission and exclusion of testimony. The defendant company offered to show by four witnesses, namely; Phillips, Blythe, Crew and Carr, certain statements which had been made to them by Baldwin at various times between the fall of 1878 and the spring of 1879, when the policy in suit was issued. One of these offers was a statement by Baldwin to Crew that he had borrowed money from a certain bank to pay Hillmon's life insurance premium; another was a statement by Baldwin to Carr that "he and Hillmon had a scheme under brogue," and if it worked out "he (Baldwin) was all right;" another was a conversation between Baldwin and Phillips, in which Baldwin inquired, in substance, either in jest or in earnest, *if it would'n't be a good scheme to get insurance on one's life in a large sum and go south and get the body of a Greaser and palm it off as your own body;* and another was a request made by Baldwin to Blythe to recommend to him some good insurance companies as he had a friend who wanted to take out some insurance.

These several statements were excluded, and, as we think, properly excluded. Even when there is sufficient evidence in a case to warrant a finding that a conspiracy was entered into by certain of the *parties* to the action to do some wrongful act, it does not follow that any and every declaration which may have been made by one of the conspirators is admissible even as against his associates in the scheme. Declarations made by one conspirator are not admissible against the others to prove the existence of the conspiracy, if such statements are not made in the others' presence. Neither are mere admissions or narrations of what has already taken place admissible,

which have no tendency to promote the objects of the conspiracy—the rule being that declarations by individual conspirators to be admissible against their associates must be made in furtherance of the common design while it is under way or in process of execution so as to form properly a part of the *res gestæ*. *State* v. *Johnson*, 40 Kan., 266, 268; *People* v. *McQuade*, 110 N. Y., 284, 307; *People* v. *Kief*, 126 N. Y., 661, 662; Greenleaf on Evidence, Vol. 3, Sec. 94, 15th Ed., and cases there cited. Tested by this rule some of the statements mentioned above, particularly those to Crew and Carr, were merely narrative of past transactions and not admissible for that reason. But for other reasons as well the testimony was not admissible against Mrs. Hillmon, who was the sole plaintiff. It was not alleged by the defendant company that she ever became a party to the alleged combination to defraud certain insurance companies, either by original participation in the scheme or by subsequently adopting it, and in the absence of any such averment we are of opinion that it would have been erroneous to have admitted as against *her* such casual declarations and inquiries of the man Baldwin as are above described. Under the issues which were presented by the pleadings we think that the trial court went quite far enough in permitting the existence of the alleged conspiracy between Hillmon, Brown and Baldwin to be shown for the purpose of strengthening the probability that Hillmon was not in fact dead but was concealing himself. The existence of the alleged conspiracy was a single isolated fact which the jury might have regarded as having some probative force in solving the real issue in the case as to whether Hill-

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mon was accidentally killed at the time and place alleged in the complaint.

Further complaint is made by the defendant because the trial court refused to permit it to show by certain oral testimony and by reading one section of the Criminal Code of the State of Texas, that in the early part of the year 1878, Hillmon had committed an offense against the laws of the State of Texas by removing out of that state certain personal property which he had bought and mortgaged, with an intent to defraud the mortgagor. The admissibility of this evidence is urged upon the ground that if admitted it would have disclosed a motive for Hillmon's "disappearance and continued absence." We are of opinion, however, that the evidence was unnecessary for this purpose, as a sufficient motive was disclosed for his disappearance and continued absence, and no further evidence in that behalf was needed, if the defendant's theory of the case was right, that Hillmon was not dead when the suit was brought but was merely hiding to enable his wife to collect certain insurance upon his life. The trial court did permit the defendant to show the purchase of the personal property in question and the reasons given by Hillmon for its purchase and the fact that it had been removed and not paid for, and that the property was subsequently sold, this latter testimony being admitted, as we infer, upon the theory that the defendant had the right to trace all of Hillmon's movements and to exploit his actions for some months before the policy in suit was taken out, for the light it might possibly shed on his subsequent conduct. The introduction of the Criminal Statute of Texas and the other evidence was unnecessary to establish a motive for Hillmon's dis-

appearance and the exclusion thereof cannot be regarded as a material error.

A further complaint is made because the trial judge said in his charge with reference to a written statement that had been made by John H. Brown, one of the alleged conspirators, whose deposition had also been taken and read by the plaintiff, that said statement was "not *affirmative evidence* of the truth of any matter therein contained and * * * should not be considered * * * except as affecting the credibility of the evidence of said Brown given in his deposition." The statement of Brown which was thus mentioned and his deposition were entirely irreconcilable as respects the question whether Hillmon was killed on March 17, 1879, or whether the person killed was another man. The direction which the court gave to consider Brown's statement as affecting the credence which should be given to his deposition was in effect, therefore, a direction to the jury to determine on which occasion Brown had told the truth; whether when his deposition was taken or when an ex parte statement was obtained from him by a lawyer by the name of Buchan, who seems to have been in the employ of the defendant company, or at least to have been acting in its behalf and in its interest. We are relieved, however, of the necessity of deciding whether there was anything misleading in the excerpt from the charge which has been quoted above, by the fact that no exception was taken thereto, and we may reasonably infer from the fact that no exception was taken, that the direction given by the court that Brown's sworn statement to the defendant's attorney was not "*affirmative evidence*," etc., was not deemed to be of much importance or as liable to mislead, when the case was submitted to the jury.

In behalf of the defendant company an instruction was asked, which was refused, to the effect that Brown's sworn statement which was in conflict with his deposition might "be considered in connection with the deposition * * * as evidence of the facts therein stated * * * *with like effect* as the deposition of John H. Brown, and may also be considered as affecting the credibility of said Brown." We think that this instruction was faulty and fully as liable to mislead, as the court's charge on the subject, inasmuch as it required the jury to attach as much weight to the one document as to the other, irrespective of the circumstances under which the two documents had been obtained. There was evidence in the case which tended to show that the ex parte statement had been obtained from Brown on September 4, 1879, by much persuasion and by covert threats; and by some unprofessional conduct on the part of the attorney who had obtained it; and that it had been used to induce the plaintiff to release her cause of action upon the policy in suit without consideration. On the other hand, Brown's deposition had been taken at a later date in the usual way and he had been cross-examined by the defendant company at great length. In his deposition he admitted having made the statement and asserted that the statements therein contained to the effect that Hillmon was not dead and that another man had been killed were each false. He also explained the reasons and the influences which had been brought to bear upon him to induce him to make the false statement. It was the province of the jury to decide, in view of all the circumstances tending to show how the ex parte statement had been obtained and the use that had been made of the same, and in view of the fact that it had been introduced into the case by the

plaintiff, not as credible testimony, but merely for the purpose of discrediting it—whether they would treat it "*with like effect*" or consider it as entitled to the same credence as Brown's deposition. If the court had given the defendant's instruction it might well be said, we think, that it had invaded the province of the jury.

Complaint is made in behalf of the defendant company because the trial court did not give an instruction to the effect that proof had been offered which had not been disputed, that the corpse brought back from Medicine Lodge to Lawrence, Kansas, had a perfect set of teeth and that the jury should return a verdict for the defendant if they found from a preponderance of evidence that Hillmon in his lifetime had lost a tooth or had imperfect teeth.

This instruction was in the nature of a commentary on one feature of the evidence which the court, in our judgment, was not required to make, inasmuch as it appears that there was considerable conflict in the evidence as to the kind of teeth which Hillmon had. Some persons, as it would seem from the testimony, might regard him as having good teeth, and some as having teeth that were imperfect. Besides, this instruction singled out one fact bearing upon the question whether the corpse that was brought back to Lawrence was Hillmon's body, and gave it undue prominence, inasmuch as there were many other facts and circumstances in evidence which had an immediate bearing on the same question, and might be regarded as very persuasive evidence that the body returned was Hillmon's dead body. This issue as to whether it was Hillmon's body or the body of some other person was fairly submitted to the jury by the court's charge, and we do not perceive that a

reversible error was committed in the refusal of the defendant's instruction.

Another contention on the part of the defendant company is, that the trial court erred in permitting the plaintiff to have six peremptory challenges when the jury was empaneled. With reference to this point it is to be observed that at the time of the last trial there were two actions pending in behalf of the plaintiff upon policies of insurance on the life of her husband, one against the present defendant and the other against the Mutual Life Insurance Company of New York, both of which actions involved the same issue as to whether her husband was dead or alive. Originally there had been three such actions, one against the New York Life Insurance Company, but the latter action had been compromised prior to the last trial. The trial judge ruled that if the two actions which remained to be tried had not already been consolidated for trial under existing orders, he would order their consolidation, as the issue in each case was the same, and the trial thereof would be exceedingly lengthy. It goes without saying that such order of consolidation was within the discretionary power of the trial judge, and we have no doubt that in the present instance the power was wisely exercised. At all events, it affords no ground for a successful complaint on writ of error. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S., 285, 293. It is urged, however, by learned counsel for the defendant, that as the two actions were consolidated for trial the plaintiff was only entitled to three peremptory challenges. It is to be observed that when this case was before the Supreme Court and was under consideration in the case last cited (145 U. S., 285), that court held that when actions are consolidated such an order does not operate to

deprive either defendant of the right to challenge as many jurors peremptorily as he would have been entitled to challenge if the cases had been tried separately, and the former judgment in favor of the plaintiff was reversed because each defendant to the consolidated cause was not allowed three peremptory challenges. If this rule is applied to the defendants; that is to say, if consolidated causes are treated separately so far as the defendants are concerned for the purpose of preserving to them their respective rights of challenge, we perceive no reason why the same rule should not be applied to the plaintiff so as to entitle her to the same number of challenges which she would have been entitled to had the cases been tried separately. The learned judge of the trial court acted in accordance with this view, and in so doing we think that he committed no error. It certainly does not appear that the defendant company was prejudiced by permitting the plaintiff to have six peremptory challenges and the defendants three challenges each, or six in all.

There are some other assignments of error which have been discussed by counsel for the defendant company, all of which have been carefully considered and found to be without merit. None of them, we think, are entitled to as much consideration as the various assignments already considered. This case has been pending, as heretofore stated, for more than twenty-one years, and it would be a matter of great regret and a reproach to our method of administering justice, if, after six laborious and lengthy trials, an error had crept into the record of such consequence as to require a reversal. We are satisfied that no such error was committed and it is accordingly ordered that the judgment below be

Affirmed.

SANBORN, Circuit Judge, dissenting.

Within six months after the alleged death of Hillmon, John H. Brown, who was with Hillmon when the person, whoever he was, whose body was claimed to be that of Hillmon, was killed, made an affidavit that this body was not Hillmon's, that it was the corpse of another man whom Hillmon had killed, that Hillmon was still living and that this cadaver was produced to enable the plaintiff below to collect the $25,000 insurance on Hillmon's life pursuant to a conspiracy which Baldwin, Hillmon and Brown had formed to accomplish that end. On the trial of this action the plaintiff offered this affidavit in evidence and it was received without objection. She also offered in evidence Brown's deposition taken at a later date than the affidavit, in which he testified that Hillmon was dead and that it was his corpse and not that of another person which was produced by him and Baldwin in March, 1879. At the close of the trial counsel for the defendant requested the court to charge the jury that Brown's affidavit might "be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness." To this request the court responded in its charge in these words: "The oral declarations of said Brown not under oath and the statement signed and sworn to by him are not affirmative evidence of the truth of any matter therein contained or mentioned and they should not be considered by you except as affecting the credibility of the evidence of the said Brown in his deposition," and refused to grant the request. The defendant excepted to the refusal but did not except to the charge.

A perusal of this brief statement of the record upon this subject will not, it seems to me, raise a doubt in the mind of any reader that the question presented by the request, that ruled by the charge and that decided by the refusal to grant the request was the single question whether or not the affidavit of Brown was any evidence of the facts it recited. This, it seems to me, was the only question intended to be raised by the request, was the question which the charge clearly shows that the court understood was presented and was the only question ruled either by the refusal of the request or by the terms of the charge upon this subject. If this view is correct, the exception to the refusal to grant the request fairly presents the ruling upon this issue. The argument that the question whether or not the affidavit was evidence of the facts it recited was not presented because the request asserted that the affidavit was evidence with like effect as the deposition seems to me to be too technical and critical. The meaning of the words "with like effect" in this request was that the affidavit was evidence of the facts which it recited subject to the right of the jury to question, believe or disbelieve its statements in the same way that the deposition was evidence of the facts it related subject to the same right of the jury, and not that the jury must believe the affidavit just as much as they should believe the deposition. The court below had this understanding of the issue which this request presented. It clearly understood that it was an invitation to charge that the affidavit was evidence not only of the lack of credibility of Brown, but also of the facts which it recited and when it came to rule upon the issue it refused the request and directly contradicted the declaration that the affidavit was evidence

of the facts it related while it conceded that it might be considered upon the question of the credibility of the witness. The request and the charge seem to me to fairly present one and only one question which was clearly understood and directly ruled by the court both in its charge and in its refusal to grant the request, the question whether or not the affidavit was evidence of the facts it recited. In the light of the charge, which contradicted the terms of the request, the refusal of the request ruled this question as directly as the charge itself, and for that reason the exception to the refusal fairly challenged the error and entitled the defendant to a review of the ruling.

When we turn to a consideration of the correctness of the ruling itself no issue is presented for argument or consideration. Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give to the opposing party the opportunity and right of cross-examination and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of such evidence have this effect for he who introduces testimony is ordinarily in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence and the defendant consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited because the defendant relied, and had the right to rely upon it for that purpose and because the plaintiff having

introduced it was not permitted to take the inconsistent position that it was not competent evidence of the facts it related. *Walton* v. *Chicago, St. P., M. & O. Ry. Co.*, 56 Fed. 1006, 1008, 6 C. C. A. 223, 225, 12 U. S. App. 511, 513; *National Loan & Investment Co.* v. *Rockland*, 94 Fed. 335, 337, 36 C. C. A. 370, 372. The affidavit was persuasive telling evidence upon the crucial questions in the case, upon the identity of the corpse and upon the conspiracy to defraud the defendant and yet the company was deprived of its benefit by this ruling of the court. This error is so plain and glaring, and it necessarily deprived the defendant of such important testimony that in my opinion it ought not to be disregarded.

2. Sufficient evidence of a conspiracy between Baldwin, Hillmon and Brown to obtain the insurance upon the life of Hillmon and to produce the body of some other person and collect the insurance was produced at the trial to induce the court to submit this evidence to the jury upon the question whether or not the body produced by Brown and Balwin was that of Hillmon. In this state of the case the testimony of Phillips that Baldwin inquired of him about insurance, how long it would take a dead body to decompose and said that it would be a good scheme to get insurance and go down south and get the body of a greaser and collect it, the testimony of Blythe, a lawyer, that Baldwin told him that a friend of his wanted to get insurance and inquired of him what companies were good, the testimony of Crew that in February or March, 1879, Baldwin said that his indebtedness to the bank had arisen because he had furnished money to pay the premium on Hillmon's insurance and that he expected to have $10,000 of the insurance money, and the testimony of

Carr that about March 10, 1879, Baldwin told him that he and Hillmon had a scheme under "brogue" and that if it worked out right he was all right was offered in evidence. Several of these conversations were had after the insurance on Hillmon's life had been secured and before the killing on March 17, 1879. They were had while Baldwin was engaged in carrying on and working out the conspiracy. All this testimony was rejected by the court. In my opinion this testimony detailed verbal acts and declarations of Baldwin, one of the conspirators, while they were engaged in executing the conspiracy and upon that ground it was competent evidence essential to the maintenance of the case of the defendant. *Drake* v. *Stewart*, 76 Fed. 140, 22 C. C. A. 104, 40 U. S. App., 173; *Smith* v. *National Benefit Society*, 123 N. Y. 85; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 296, 298.

The contention that this testimony constituted no evidence against the plaintiff because she was not alleged to be a party to the conspiracy does not seem to me to be sound. There was sufficient evidence of a conspiracy to obtain this policy to defraud the company to warrant the court in submitting this testimony to the jury. If the conspiracy was formed and the policy was obtained by John W. Hillmon, one of the conspirators, in pursuance of a plan that he formed to defraud the company, any assignee or beneficiary of the policy necessarily took it subject to its original defect and any evidence competent to show that it was originally obtained by fraud must be competent against any one who holds it for the policy still has that defect in the hands of the assignee or beneficiary. *National Life Ins. Co.* v. *Minch*, 53 N. Y. 144; *Carpenter* v. *Ins. Co.*, 1 Story 57; *Burrus* v. *National Life*

Ass'n, 32 S. E. 49; 1 Biddle on Ins. 448-9. For these reasons the judgment below should in my opinion be reversed and the case should be remanded to the court below for another trial.

Filed April 3, 1901.

A true copy.

Attest:

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

[SEAL]

No. 662 Sup. Ct. 93

Brf. of Porter, Beale, Green & Isham

For Petitioner

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JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed May 10, 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
SALLIE E. HILLMON,
Respondent.

662

Brief in Support of Petition for Certiorari.

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I.

Right of Challenge.

This question is presented in the record by exceptions appearing at pages 71–2, 136–7, and by Assignments of Error No. 4–7, at pages 1932–3.

The order made by the Circuit Court below consolidating the cases for trial was made under authority of Sec. 921 of the Revised Statutes, which is as follows:

> "Sec. 921. When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning

> proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

As that statute was construed the effect of such consolidation of two cases for trial was to give the plaintiff six peremptory challenges to the jury, while each defendant had but three. Concerning this statute this court has declared as follows, *Insurance Co.* v. *Hillman*, 145 U. S., 285, 293:

> "Although the defendants might lawfully be compelled at the discretion of the court to try the cases together, the causes of action remained distinct and require separate verdicts and judgments; and no defendant could be deprived, *without its consent*, of any right material to its defense whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

The ruling of the court that the plaintiff was entitled to six challenges was in effect a contrary construction of the statute. If, as between the plaintiff and each defendant, these parties cannot, as to the same jury, be given their exact rights on the one hand and limited to their exact rights on the other, the only alternative is to sever the causes and try them separately.

Stroh v. *Hinchman*, 37 Mich., 490.
State v. *Stoughton et al.*, 51 Vert., 365.
Cruce v. *The State*, 59 Ga., 90.

At common law peremptory challenges existed as a right in criminal but not in civil cases. When an Act of Parliament declared simply that a party in a civil cause might have so many peremptory challenges, the right thus extended into civil cases found its definition and conditions

already established by law. Limitations which the statute refrained from imposing could not be imposed by the court. The court therefore in the absence of express statute had and has no more power to change the statutory number of challenges, or to *subject a defendant to new conditions in the making up of the jury*, than it has to deprive him of his jury altogether. On a former trial of these cases the Circuit Court conceived them so effectively consolidated that the defendants in all three cases were entitled only to the number of challenges allowed by statute in one case. Upon this ground the Supreme Court *reversed the judgment*, *Insurance Co.* v. *Hillmon*, 145 U. S., 285, 293, and held that the cases were joined for trial in form only while they remained radically distinct, and the right of each defendant *remained unimpaired in its own case*. In this trial the court has passed to precisely the opposite extreme. The right of *each* defendant does *not remain unimpaired in its own case* any more than in the former instance. There each *defendant* was allowed *fewer* challenges than was its right to a single jury. Here the *plaintiff* is allowed *more* challenges than was her right against *each* defendant to a single jury. It was necessary, of course, and the court ordered, that there should be a separate verdict in each case; and therefore the composition of the jury was of precisely the same practical importance to this plaintiff in error as if its case had been tried separately.

The defendant in one of the separate cases *had no common* interest with the defendant in the other such as corresponds to the single interest of several defendants in one cause, or that of the *single plaintiff* in all the causes. The two defendants here were entitled to an *aggregate* of six challenges. But if, as occurred in this case,

one defendant omitted to use one of its challenges, the other could not take it up and use it. Each defendant did use but two, but if the Mutual Life had omitted to use any of its three, the Connecticut Mutual could not have used six. Its *right* was limited to three. On the other hand the plaintiff was given six to the one jury irrespective of the number used by either defendant. So one defendant has no advantage of the unused challenges of another defendant; nor if it had could that help the matter, for the court has no power to increase the statutory number of challenges to either party by giving an equal number to the other. Under the decision of the Supreme Court no party is given more than the three statutory challenges to the one jury by which its cause is tried; nor does the statute give a plaintiff *more* challenges to the jury by which any defendant is to be tried than are given to that defendant. The court had no power, therefore, to alter the conditions as to any defendant affecting *the composition of the jury*. If it could not in this particular give each defendant a trial under the same conditions in that respect as if the cases were separately tried, the only alternative was to sever the causes and allow a separate trial. Such has always been the established rule of law. It matters little in effect whether the composition of the jury is affected prejudicially to the defendant by abridging the defendant's challenges or by according a disproportionate number to the plaintiff. A situation, *never improbable*, may easily present itself to the imagination of the court. In a forum charged with an atmosphere of social or political prejudice, where a panel is to be filled by talesmen taken from bystanders (as was done upon the trial of this case before Judge

Williams in 1896 (*Rec.*, 51), though the record is silent upon that matter in the present instance), every additional peremptory challenge makes arbitrarily a vacancy which may be filled, in spite of the defendant, by a juror inspired by such prejudice. The right of every and of each defendant that its adversary shall not have against it a disproportionate number of peremptory challenges is as absolute and as important as its right to its own full number; and one is correlative to the other. Always it has been held that the right of peremptory challenge on the part of the defendants could not be abridged by uniting cases for trial (*U. S.* v. *Marchant*, 12 Wheat., 480), and equally the conclusion has been repudiated that the peremptory challenges of the state or of a plaintiff could be multiplied by that process. The whole body of authority and of adjudication is in denial of such conclusion.

Thompson in his work on Trials says in Sec. 45:

> "Although the defendants so jointly indicted may severally be permitted the statutory number of challenges, *this does not increase the number allowed to the state* beyond the number allowed to it in the case of a single defendant."

Proffatt in his work on Jury Trials says in Sec. 164:

> "*No matter how many are tried on the same indictment the prosecuting officer is only entitled to his challenges for one and cannot claim them for all.*"

In *Savage and James* v. *The State*, 18 Fla., 909, the court said:

> "The ninth, seventeenth and eighteenth errors assigned are that the court allowed the state attorney more than five peremptory challenges.
>
> Four persons called as jurors were challenged peremptorily by the state after it had so challenged five, and the challenges were allowed by the court. The statute allows challenges as follows: 'In capital

cases the prisoner shall have twenty peremptory challenges and the state five.'

Where two are jointly indicted and tried for a capital offense each prisoner is allowed twenty peremptory challenges, but the law does not allow more than five to the state as to both. *To allow the state to challenge five for each would in effect give the state ten for each prisoner, because each challenge affects each prisoner alike.* Counsel for the plaintiffs in error cite several authorities to sustain this position.

We have found no other cases directly in point. It is unnecessary to consider this question further. It is clear that the court erred in allowing more than five peremptory challenges to the state, and an exception having been taken to the action of the court there was *material error affecting the rights of the defendants.*"

In *Wiggins* v. *The State*, 1 Lea (Tenn.), 738, the court said:

"In making up the jury for the trial of the defendants (in court below) after the state, through the attorney general, had challenged four jurors, another juror being presented was challenged by the state and accepted by the accused; but the court being of opinion that when two defendants were on trial under a joint indictment the state was entitled to double challenges, overruled the motion of the defendants that the juror should take his seat for the trial of the cause, and afterwards, the defendants having exhausted their challenges, the jury were elected.

By the act of 1875, ch. 75, 'in the trial of criminal prosecutions' of this character the state is entitled to four peremptory challenges. Under the act of 1829, ch. 55, which provided that 'in the trial of all indictments,' etc., 'the state and the defendant shall each be entitled to challenge peremptorily five jurors,' it was held that where two defendants were arraigned each had the right to the full number of challenges. (*Hill* v. *State*, 2 Yer.,

246.) The rule thus established has been followed ever since. But the court refused to extend the rule to civil cases. (*Blackburn* v. *Hays*, 4 Col., 227.) It is argued that the state should have the benefit of the construction. But the reason of the rule is, that the right is given to the defendants, and where there are several defendants, although they may be tried together, *yet the judgments may be different. Each defendant is on trial, and must stand or fall, ordinarily, as if tried alone.* It is only a natural and reasonable construction of the statute to hold that every defendant should have the benefit of its provisions. The state, however, *is not multiplied with the defendants*, and, having elected to indict and try the parties together, cannot claim beyond the fair meaning of the language used. Nor has the construction contended for ever prevailed in practice. The court erred, therefore, in its ruling."

In *Mahan* v. *The State*, 10 Ohio, 234, the court said:

"It is provided by the fifteenth section of the act, entitled, 'An Act relating to juries,' 29 Ohio Laws, 98, that every prosecuting attorney, and every defendant on the trial of an indictment, may challenge, peremptorily, two of the panel; and if any person, prosecuting in behalf of the state, shall challenge any petit juror, except as aforesaid, he shall immediately assign the cause of such challenge. It would seem to us this language can hardly admit of construction. The words themselves express the legislative intention as clearly as it could be well conveyed.

There was but *one* indictment, and, on the part of the state, *the right of peremptory challenge should have been confined to two*, while each of the defendants could, in like manner, legally object to the same number. Had the defendants been separately tried the indictment would have been separate as to each: *Bixbe* v. *The State of Ohio*, 6 Ohio Rep., 86; and on every trial the state's right to such challenge of two of the jurors would have been legal; but upon a joint trial it is otherwise.

In extending this right of peremptory challenge to *six*, as claimed by the state, it is our opinion, *the privileges which the law throws around the accused, to a certain extent, as a shield for his protection, in the selection of his triers, was clearly invaded*, and that the Court of Common Pleas, therefore, erred."

In *State* v. *Earle*, 24 La. Ann., 38, the court said:

"It appears from an inspection of the first bill of exceptions taken during the trial, that the state was allowed to challenge peremptorily *more than six jurors*, the court below deciding that each prisoner was entitled to twelve peremptory challenges and '*the state to six for each accused.*'

It is true that each defendant was entitled to twelve peremptory challenges, but it *by no means follows that the state is entitled to six for each defendant.* The state has no rights in the matter beyond those conferred by the statute, and the statute declares that 'in all criminal prosecutions wherein the defendant is allowed peremptory challenges, the state shall also be allowed to challenge without cause any number not exceeding six.' R. S. 1870, Sec. 998. This means, clearly, six in a single prosecution in the trial of a single indictment—without any reference to the number of defendants included in the prosecution or mentioned in the indictment. The language is plain; the case at bar is within its provisions, and we are, therefore, constrained to think the court erred in allowing the number of peremptory challenges by the state to exceed six."

In *Schoeffler* v. *The State*, 3 Wis., 823, the court said:

"Upon the trial of indictments for a capital offense, when there are more than one defendant, each defendant is entitled to challenge twenty-four jurors peremptorily. One or all may be found guilty, and *each one must be regarded as defending for himself.* Not so in regard to the prosecution. The state is prosecuting for one crime, and though several may be guilty of it, all may be included in the same indictment, and thus make one prosecution, or each

may be indicted separately. *If, therefore, the prosecuting officer desires to secure to himself six peremptory challenges for each defendant, he should prosecute each separately.* But, while he cannot curtail the right of any defendant whom he may choose to join in the indictment, by adopting a joint prosecution against several, he thereby makes the *state a party, one and indivisible, upon the one hand, and each of the defendants a party on the other.* The right to peremptory challenges is purely a creature of the statute, and it cannot be extended beyond its obvious purview. We are therefore of the opinion that the court below erred in allowing the prosecuting officer to challenge peremptorily the juror Fairfield, he having already been allowed six such challenges. If the statute should be so construed as to allow the prosecuting officer six challenges for each defendant, *he could multiply such challenges indefinitely by simply increasing the number of defendants.* Such a construction ought not to be allowed, *as it might defeat the very object and intent of the statute.* We do not know, of course, why the prosecution challenged the juror. It is sufficient to know that he was to all appearance competent; that he was acceptable to the defendants, and that the challenge of the prosecuting officer was unauthorized by law."

The plain result is that the number of challenges *to the same jury* cannot be *changed as to any party* by joining the cases under the statute for convenience or economy of trial.

2.

Defense of Fraud and Conspiracy.

This question is presented in the record by exceptions at pages 1911–12, 1915, 1925–6, and by Assignments of Error Nos. 87, 88, 89, 91, 92, at pages 1,997–2,000.

The third section of the petition relates to the exclusion by the court below of the defense of fraud and con-

spiracy presented by the second plea of the defendants. The scope of that defense set up by that plea is stated in the petition. The grounds upon which the entire subject-matter of that defense was excluded from the case seem contrary to rules of law well settled in this court as in all others. The court excluded the defense, apparently holding, first, that it could not be interposed against the beneficiary in the policy because she was not affirmatively charged in the pleading as one of the co-conspirators (*Rec.*, 1921; Petition, pp. 34–8), and, second, because the plea failed adequately to present as a defense the conspiracy to procure the policy for the undisclosed purpose of fraud, and that its averments were insufficient to advise the plaintiff that she would meet defense of that character. The contention of the defendant, the petitioner, is that, for the purpose of interposing that defense against the plaintiff it was not necessary to charge her with participation in the fraud or conspiracy at all; that as the beneficiary in the policy the contract was subject to that defense as against her in any event, and that it was clearly so in the present case for two special reasons, first, that the contract contained in terms this express provision, to-wit: "*If this policy has been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same shall be absolutely null and void*" (*Rec.*, 6); and further, that the contract itself was in actual effect not one with the plaintiff but a contract made with Hillmon for her benefit. (*Aetna Life Ins. Co.* v. *France*, 94 U. S., 561, 564.) She derived her only claim through him as a voluntary beneficiary, no consideration whatever emanating from her. The application is made and signed by Hillmon, and also in conformity to provisions on the face

of the policy signed with the name of the assured, Sallie E. Hillmon, by Hillmon himself (*Rec.*, 153–4). The contract of the Insurance Company in this case was, therefore, with Hillmon distinctly, and not with the plaintiff. To the extent to which there may be claimed to be any contract between the Insurance Company and the gratuitous beneficiary, the plaintiff, it rests upon an assumed agency of Hillmon for her, which she must and does affirm in making any claim under the policy. In any event, therefore, the result is the same; as a contract with her she is bound by its express stipulations; as a contract with Hillmon, the insured, any interest she may have under it must be subject to any fraud that would affect the contract as against Hillmon, and in claiming under such policy she adopts such fraud and makes it her own. Under these circumstances the rule of law establishes that the contract in this case is one directly between the Insurance Company and Hillmon, and the voluntary beneficiary can claim under it only subject to any defense of fraud that would affect the insured himself. Thus, in *1 Biddle on Insurance*, Sec. 449, it is said:

> "The fraud of the insured would obviously affect a third party who was a payee under the policy."

In *Veazie* v. *Williams*, 8 How., 134, the purchaser of property at an auction sale filed a bill to set the sale aside on the ground that he had been induced to pay an exorbitant price by the fraudulent acts of the auctioneer, in which the defendants, the former owners, were charged to have participated. The answer of the defendants denied that they or their agent had participated in the fraud, and the evidence failed to show that they had in fact done so.

In that connection the court on page 153 said:

> "Though no evidence is seen of fraud practiced by the respondents in person, nor by their express directions, yet a fraud was evidently perpetrated by the auctioneer, as agent for the respondents, or by him in connection with Stephen H. Williams, and the respondents have taken and still retain the benefit of it. This conclusion is indisputable, whatever obscurity or concealment may have been flung over the case by the auctioneer."

After stating that the owners were not liable for the fraud on the ground that they had personally participated in it, the court on page 157 said:

> "But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed in *statu quo;* or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury.
>
> * * * * *
>
> But the test here is, was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson* v. *Fuller*, 3 Adolph. & Ell., N. S., 68.
>
> The sale, thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration, and take back the mills, or indemnify the purchaser to the extent of his suffering."

In *New York Life Ins. Co.* v. *Fletcher*, 117 U. S., 519, a suit brought by an executor of the insured to recover upon a policy was defended by the company upon the ground that false statements had been made in the application. It appeared that the insured, in answer to questions propounded by agents of the company, had truthfully stated his condition, but that the agents

had written false answers in the application without the knowledge of the insured.

Mr. Justice FIELD, in delivering the opinion of the court, said:

> "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. *He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed.* The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.
>
> The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment he was not called upon to take any steps for the cancellation of the contract. In other words, *the jury were told that the assured might take to himself the benefit of the fraud, without responsibility for it, if he did not discover it until after it was consummated—a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it.*"

In *Aetna Life Insurance Co.* v. *Davey*, 122 U. S., 739, the defense of fraudulent misstatements in the application, set up by the defendant company in a suit by the wife upon a policy of insurance in which she was named as beneficiary, was entertained without question,

although the wife was not charged nor shown to have been a party to the fraudulent misstatements.

To the same effect are

Maier v. *Fidelity Mutual Life Ins. Co.*, 78 Fed., 566; 24 C. C. A. 239 (6th Cir.).

Hubbard v. *Mutual Reserve Fund Life Ass'n.*, 100 Fed., 719; 40 C. C. A. 605 (1st Cir.).

The principles thus established by express decision of this court and by the Circuit Courts of Appeal for the first and sixth circuits are the same that are recognized and illustrated by the following judgments of other tribunals:

In *Continental Insurance Co.* v. *Insurance Co. of State of Pennsylvania*, 51 Fed., 884; 2 C. C. A. 535 (2nd Cir.), the common agent of four marine insurance companies by fraudulent shifting of risks and effecting re-insurance, caused one company to bear an unfair proport on of losses, resulting in a corresponding gain to another. After discovering the fraud, the company defrauded sued the company for whose benefit the frauds had been committed, and a recovery was allowed, although the latter was in no way responsible for nor aware of the agent's frauds.

The appellate court in affirming the judgment said:

> "The case is one for the application of the rule that *he who seeks to avail himself of the advantages of the act of another, after knowledge of its fraudulent character, must be held to adopt the fraud, although at the time of the act he was ignorant of it.* The doctrine is elementary, and prevails at law as well as in equity, that a person, though innocent himself, cannot retain an advantage obtained by the fraud of another, in the absence of some consideration moving from himself."

In *Carpenter* v. *American Ins. Co.*, 1 Story, 57; 5 Fed. Cases, 105, a policy was procured from the defendant by the owners of the insured property for the benefit, however, of their mortgagee. They subsequently sold the property and assigned the policy to the plaintiff. In a suit by the plaintiff it was urged that misrepresentations made by the original owners in order to obtain the policy could not be set up in a suit in which the mortgagee was the true beneficiary and innocent of the misrepresentations. The court, by Mr. Justice STORY, said:

> "It is suggested that the misrepresentation was in fact unintentional and without any fraudulent design, and that Epenetus Reed (the mortgagee), for whose benefit the insurance was made, was entirely ignorant of the misrepresentation; and that, under such circumstances, his rights under the policy ought not to be prejudiced thereby. But this suggestion cannot avail for the plaintiff or for Reed. *The misrepresentation made by an agent in procuring a policy, is equally fatal, whether made with the knowledge or consent of the principal, or not.* The ground in each case is the same. The underwriters are deceived. They execute the policy upon the faith of statements, material to the risk, which turn out to be untrue. The mistake is, therefore, fatal to the policy, as it goes to the very essence of the contract."

In *Burruss* v. *National Life Association*, 96 Va., 543, 32 S. E., 49, 50 a policy was taken out by a debtor for the benefit of his creditor. The insured made false representations unknown to the beneficiary. In a suit by the beneficiary upon the policy it was contended that the fraud of the insured could not affect the innocent beneficiary's rights. The court, by HARRISON, J., said:

> "It would hardly be contended that if the insured had taken out this policy for his own benefit his estate could recover it, in the face of the gross fraud shown to have been perpetrated by him in procuring

it. There is nothing in the circumstances of the case to place the beneficiary in any better position than the insured would have occupied had the policy been for his benefit. Where insurance is effected upon the life of a third person for the benefit of a creditor, and misrepresentations of material matters inducing the contract are made by the party whose life is insured, it will vitiate the policy, although the beneficiary was ignorant of such false representations."

In *Baker* v. *Life Insurance Co.*, 43 N. Y., 283, 286 insurance was effected by a husband for the benefit of his wife, and failure to pay upon maturity any premium notes would forfeit the policy by its terms. Without the knowledge of the beneficiary the husband failed in the payment of such a note, and in a suit upon the policy after his death recovery was denied. The court said:

"The insurance was effected by the husband for the benefit of his wife and as a provision for her in case of his death. *He was the party contracting with the defendants*, and the consideration for the agreement to insure proceeded from him, not from the wife."

Further, on page 287:

"In this case the husband agreed for the insurance and caused his wife to be named as the beneficiary in the policy. It was nevertheless *a contract with the husband*, and the terms and *conditions to which he assented* attached to and qualified the policy and determined the liability of the insurers."

And further, on pages 288–9:

"The case will not be changed, if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and, claiming the benefit of his acts, and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with

all its terms and conditions (*Elwell* v. *Chamberlain*, 31 N. Y., 611; *Bennett* v. *Judson*, 21 *id.*, 238)."

In *Maynard* v. *Rhode*, 1 Car. & Payne, 360, the judgment of the court is correctly stated in the syllabus, as follows:

> "Where an insurance is effected on the life of a third person by a creditor, and misrepresentations are made by the party whose life is insured, of the state of his health, this will vitiate the policy, though the creditor for whose benefit the policy was effected was ignorant of the representations being false, and though the party did not die of the disease he was then afflicted with."

To the same effect are:

1 Biddle on Insurance, Secs. 448–9.

Phillips on Insurance, Sec. 543.

1 May on Insurance, Sec. 122.

Bliss on Insurance, Sec. 316.

Joyce on Insurance, Vol. 1, Sec. 646; Vol. 2, Sec. 2652.

Bennett v. *Judson*, 21 N. Y., 238.

Warner v. *Warner*, 46 N. Y., 228.

Smith v. *National Benefit Society*, 123 N. Y., 85.

Estes v. *Life Insurance Co.*, 13 Sup. Ct. Rep., N. Y., 349.

Draper v. *Fire Insurance Co.*, 2 Allen, 569.

Forbes v. *Life Insurance Co.*, 151 Ind., 89; 51 N. E., 84.

Atlas Tack Co. v. *Exchange Bank*, 111 Ga., 703; 36 S. E., 939, 942.

The judgment in this case, affirmed by the Circuit Court of Appeals, that the defense of fraud and con-

spiracy alleged in the pleading cannot be interposed against the plaintiff in the case unless she is affirmatively charged as a co-conspirator and a participant in the fraud, is, therefore, conflict directly with rules of law established by this court, and by Circuit Courts of Appeal for other circuits, and which equally prevail in every forum. The interposition of this defense and its establishment was of vital interest and of the utmost importance to the defendant. If, therefore, the principles and rules announced by this court are supreme and are to prevail, the Circuit Court was wrong when it excluded that subject-matter of defense, and when it confined the application of the fact of fraud and conspiracy to its weight as evidence on the identity of the corpse brought from Medicine Lodge to Lawrence, and when it said to the jury:

> "If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, *then it is unnecessary for you to find whether there was or was not a conspiracy.* The essential point in these cases is the identity of the corpse." (*Rec.*, 1921.)

If the rulings of this court had been allowed to prevail, and in accordance therewith the fraud and conspiracy charged by the defendant held admissible as a defense against the plaintiff, though not charged with actual participation, then quite apart from the question of identity of the corpse brought to Lawrence it *would* have been necessary for the jury "*to find whether there was or was not a conspiracy.*" There would have *remained* a deeper and more important question than that of the identity of that corpse, namely, the question of the fraud that might make the contract void *ab initio* against the plaintiff, even if the body were that of Hillmon. It was insisted in the Circuit Court as well as in the Circuit Court

of Appeals—and one hardly knows where to begin the argument of a proposition seemingly so self-evident as this—that if the contract of insurance was procured from the insurance companies not in good faith but by conspiracy and collusion for the covert and undisclosed purpose of defrauding the company by the process alleged, and the insured lost his life in the actual effort, with his confederates, to carry out and accomplish the fraud, *no representative of his* could turn about and support an action for indemnity upon that contract. Upon this point we have sought to supply an illustration. Suppose under the circumstances alleged Hillmon and Brown had been at night robbing a graveyard to procure a body to be substituted for and presented to the insurance company as that of the insured, and that while engaged in this exploit Hillmon had been shot and killed by the watchman or guard of the cemetery, could it possibly be imagined that the insurance company had ever in legal effect *contracted to pay* under such conditions, or that Hillmon ever *understood* that it had done so? If not, then even if the body produced was that of Hillmon it *was* "*necessary*" for the jury to find whether there was a conspiracy for the fraud or not; and the statement to the jury was not true that if the body was Hillmon's they must find for the plaintiff whether there was such a conspiracy or not. So broad a proposition as that of the court,—that if the jury found a contract of insurance expressed in the policy and that the insured was dead, they need look no further; that no fraud or deceit, illegality or crime in inducing the contract, or in the issuance of it, or in the conduct of the parties insured or interested under it, could possibly make the contract void or bar their rights to enforce it, finds no support in any principle ever yet announced by this court.

In *Smith* v. *National Benefit Society*, 123 N. Y., 85, in an action upon a policy the defense was that the insured *in pursuance of a scheme to defraud* the defendant and other insurance companies, procured a large amount of insurance upon his life and then committed suicide. It was held that the contract of insurance was procured, and that the death of the insured occurred, in the execution of a scheme of deliberate fraud upon the insurance companies. The scheme was "to secure a large insurance upon his life appropriate to the payment of his *creditors* and the comfort and support of his *relatives*," and to reach the result by suicide. The scheme was carried out and the insured *died in the act of executing the original fraudulent purpose.* It was held that the contract was void for the fraud, although the plaintiff was a creditor and payee of the policy, and that the suicide was itself an act of fraud upon the defendant; judgment was rendered for the defendant and this judgment was affirmed in the Court of Appeals. In that case also the court had before it a contract of insurance; the insured was dead and there was no dispute as to his identity; but that court did not instruct the jury that it need inquire no further and that fraud upon the insurance company was an immaterial issue. We cite this case again upon another proposition.

In *Patterson* v. *Nat'l Premium Mut. Life Ins. Co.*, 100 Wis., 118; 75 N. W., 980, a suit was instituted by the children of the insured upon a policy issued by the defendant upon the life of their father, made payable to his estate and by him assigned to them. One of the defenses interposed was that the insured had "*fraudulently procured the issuance of the policy with intent to commit suicide as a part of a scheme*

to defraud the defendant out of the sum of $3,000 for the benefit of his children," and that in furtherance of the scheme he had committed suicide. *The beneficiaries were not charged as a party to this fraud.* In passing upon this element of the case, the court said:

> "But it is further claimed by the defendant that the evidence tended to show a fraudulent scheme on the part of Patterson, when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing suicide, and defrauding the company for the benefit of his children. Doubtless this would be a good defense, if shown, unless it be cut off by the 'incontestable clause.' It should be a defense not based on the suicide alone, but on the whole fraud, of which the act of suicide was only the ultimate step. But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury."

In *Parker* v. *Des Moines Life Ass'n*, 108 Ia., 117; 78 N. W., 826, an action was instituted by a wife upon a policy of insurance issued by the defendant upon the life of her husband in which she was named as beneficiary. The sixth defense interposed by the defendant was that the insured had "*applied for and procured the policy in suit with the fraudulent intent to commit suicide.*" Upon this branch of the case the court said:

> "6. The sixth division of the answer set up fraud on the part of Parker in procuring the policy. It was alleged that he secured the same with the intent at the time to commit suicide. It needs no argument to show that *a secret intent of this kind would amount to a fraud;* and, as fraud vitiates all contracts, this defense, if established, *would defeat a recovery* on the policy. Being void in its inception, no rights would accrue under the contract to *any person. Patterson* v. *Insurance Co., supra.*"

We desire to call the court's attention to the following additional cases:

Insurance Co. v. *Armstrong*, 117 U. S., 591.

Ritter v. *Insurance Co.*, 169 U. S., 539.

Church v. *Proctor*, 66 Fed., 240, 244–5; 30 C. C. A., 446.

Kingsbury v. *Fleming*, 66 N. C., 524.

Cowen v. *Milbourn*, L. R. 2 Exch., 230.

Nor does it seem possible that the plaintiff should not have been adequately advised by the plea of defendant that she was likely to be met by the contention that there could be no recovery upon this contract of insurance because of the fraud and conspiracy with which it was associated. She brought suit upon a contract of insurance made with Hillmon for her benefit, which expressly provided that if the policy had been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same should be absolutely null and void, and she was met by a plea, among others, which charged that Hillmon, together with Brown and Levi Baldwin, and others unknown, "*procured*" the insurance, "*fraudulently conspiring to defraud the defendant.*" The plea also averred "that thereafter in pursuance of the said conspiracy they falsely and fraudulently pretended that Hillmon was dead, and that a certain dead body which they had procured, and had, was the body of the said Hillmon * * *." The first plea expressly traversed the averments of the plaintiff's petition, and the sole object of the second plea must have been to interpose as an additional defense the fraudulent scheme and purpose which it charged. With such specific language in the plea it

seems impossible to imagine that the plaintiff was not forewarned and advised that the defendant would prove, in support of its plea, the facts thus charged, to-wit: the fraudulent scheme and purpose for which the insurance was procured; the unlawful combination and conspiracy of Hillmon and his associates to procure it for that fraudulent purpose; that in pursuance of that conspiracy and purpose they procured the policies, and then proceeded to carry the fraudulent purpose into effect by seeking for a body to be presented as that of Hillmon, the insured. Following upon this plea, the facts were that evidence was adduced by the defendant which the charge of the court itself shows to have been sufficient to establish *prima facie* the fraudulent purpose and the conspiracy alleged by the plea. Of the subject of all this evidence she was adequately forewarned by the terms of the plea, so that no element of surprise to that point is conceivable, and these are the very facts and this the evidence upon which the instruction (*Rec.*, 1911–12) was called for by the defendant and refused by the court. The defendant insisted that these facts being proven, there could be no recovery upon the contract even if the plea charged also additional facts in the course of the consummation of the same scheme of fraud which (for the sake of the argument only, and by no means conceding it), it is assumed were not also proven. The failure (even if there had been such) to also establish those additional facts can hardly be such a surprise to the plaintiff as to entitle her to the protection of the court against so much as was proved, and to a judgment upon the contract in the face of the abundantly established fraud and criminal conspiracy with which it was tainted.

3.

Exclusion of Conspiracy Evidence.

This question is presented by exceptions appearing in the record at pages 1602–20, 1809, and by Assignments of Error No.'s 64–72, on pages 1978–84.

In section four of the petition it is insisted that if it was the right of the defendant in legitimate support of its defenses to prove against the plaintiff at all the fraudulent purpose and unlawful conspiracy charged in the plea, it was then entitled to the admission of all evidence applicable under the rules governing that subject. The defendant's right to prove the conspiracy was conceded by the Circuit Court for its bearing as evidence upon the identity of the body brought to Lawrence. (*Rec.*, 1921.) The defendant claimed equally the right to prove that conspracy to establish the fraud charged in the second plea, affecting the validity of the contract. In both of these cases, if the right to prove the conspiracy existed, the means and the mode of proof would be governed by the same rules of evidence. Having established in the Circuit Court, by evidence sufficient in the judgment of that court to be submitted to the jury, the necessary *prima facie* case of conspiracy between Hillmon and Brown and Levi Baldwin, the defendant offered to prove certain acts and declarations of Baldwin in contemplation of, and preparation for the fraudulent scheme and its consummation.

To show acts of Levi Baldwin to be taken in connection with other independent circumstances and with acts of other persons to prove that he, and Hillmon, and Brown were acting together in the prosecution of a common pur-

pose, the defendant offered (*Rec.*, 1619, 1809) to prove the following facts:

That Levi Baldwin had a conversation with Dr. Phillips in October, 1878, in which Baldwin said he was thinking of taking out some insurance, and asked if certain insurance companies were safe; and how long it would take before a dead body would decompose after it was buried; and said, "wouldn't it be a good scheme to get a large amount of insurance on your life and go down south and get the body of some 'greaser' and palm it off as your body and get the money." (*Rec.*, 1606.)

That Levi Baldwin had a conversation with J. H. Blythe, an insurance agent, in which Baldwin asked him about life insurance, saying that a relative or connection of his wanted to get some insurance, and wanted Blythe to recommend some good company to him. The court had already permitted plaintiff in error to show by the same witness a conversation between Baldwin, Hillmon and the witness, upon the same subject, a few days later. (*Rec.*, 1613.)

That Levi Baldwin, in the latter part of February, 1879, had a conversation with James S. Crew, who, as receiver of the Simpson Bank, held for collection some notes past due against Baldwin, two of which were secured by mortgage on real estate and one by chattel mortgage on live stock. During this conversation, Baldwin said that a part of the money represented by this indebtedness had been furnished to insure Hillmon's life. Crew further testified that he had heard of Hillmon's death in the latter part of March, and that shortly thereafter Baldwin came in hurriedly and told him to let his matter rest, as he was then on his way west after Hillmon's body, and that he had arranged for a portion of

the life insurance on Hillmon's life, and that as soon as he got it he would be able to straighten up all his affairs; that he was to have $10,000 of the insurance money. (*Rec.*, 1616–17.)

That, shortly after the 10th of March, Levi Baldwin had a conversation with Alexander Carr, during the course of which Baldwin said that "he and Hillmon had a scheme under brogue, and he said that if that worked out all right that he was all right." (*Rec.*, 1619.) All this evidence was excluded, and the exclusion is assigned for error.

The excluded testimony of all the witnesses in question shows *motive and inducement* in the state of Hillmon's and of Baldwin's affairs; *preparation* in pondering upon and devising a scheme of relief, and in providing money for the payment of premiums; and shows also what was occupying the mind of the dominant man and principal conspirator.

The rule applicable to evidence of this sort, as stated in 1 Greenleaf on Evidence, Sec. 184a, is universally recognized by all authority.

> "The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design."

Under this rule all evidence is relevant and admissible, which tends to show motive and preparation for what was done or furnishes indications of what was passing in the party's mind upon that subject.

Stephen's Digest of Insurance, p. 19.

Concurrently with this runs this principle in most cases, that the statements or other utterances are offered where the *material point* is, that under the circumstances *the statement was made*, and not that in itself it was true or false. Greenleaf, 101. *Mut. Life* v. *Hillmon*, 145 U. S., 296, 298. In that case this court said:

> "Such declarations are regarded as *verbal acts*, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury. *Insurance Co.* v. *Mosley*, 8 Wall., 397, 404, 405.' * * * 'So it is uniformly held that the previous declarations of the testator, offered to prove the *mental facts* involved, are competent. * * * Statements and declarations, when the state of the mind is the fact to be shown, are, therefore, received as mental acts or *conduct*. 99 Mass., 120.' * * * 'Wherever it is material to prove the state of a person's mind or *what was passing in it*, and what were *his intentions*, there you may prove what he said, because that is the only means by which you can find out what his intentions were. 1 P. D., 451.'"

The rules of evidence affecting the admissibility of acts and declarations of co-conspirators are in general the same in civil and criminal cases.

Nudd v. *Barrows*, 91 U. S., 426, 438.

In *Lincoln* v. *Claflin*, 7 Wall., 132, Mr. Justice FIELD defined the rule of evidence applicable to co-conspirators as follows:

> "The declarations of each defendant relating to

the transaction under consideration were evidence against the other though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs."

In *Wiborg* v. *U. S.*, 163 U. S., 632, 657–8, Mr. Chief Justice FULLER, in discussing the question of evidence applicable to a conspiracy, said:

"There was other evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that: 'If these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition,' and to this an exception was taken. The general rule was stated in *American Fur Co.* v. *United States*, 2 Pet., 358, 365, by Mr. Justice Washington, speaking for the court, that 'where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others.' The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestæ* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the motive and intention, *declarations* of those engaged in it *explanatory of acts done in furtherance of its object* came within the general rule and were competent."

In *State* v. *Johnson*, 40 Kan., 266; 19 Pac., 749, the court in defining the rules applicable to the proof of conspiracy, after stating that mere narrations of accomplished facts were not competent, said:

"Instances where a narrative of past events may be admissible can be imagined; but the narrative it-

self must tend in some way to promote the general purpose of the criminal enterprise. An illustration of such a declaration is given in *Cortez* v. *State*, *supra*, where it is said: 'A. will perform the part allotted to him when B. shall do a certain thing to be performed by him. B. acts, does that which is required of him, and writes to or verbally informs A. that the thing has been done. This is a narrative of a past event, but it is also in furtherance of a common design, and hence admissible. The general rule is that, to be admissible, the conspiracy must be pending, and the acts or declarations must be in furtherance of the conspiracy—the common design.'"

To the same effect are:

Cuyler v. *McCartney*, 40 N. Y., 221, 229, 243–4.

Smith v. *National Benefit Society*, 123 N. Y., 85.

State v. *Thompson*, 69 Conn., 720; 38 Atl., 868, 870.

State v. *Spalding*, 19 Conn., 237.

People v. *Bentley*, 75 Cal., 407; 17 Pac., 436.

State v. *Walker*, 98 Mo., 95; 9 S. W., 646.

Hart v. *Hicks*, 129 Mo., 99; 31 S. W., 351.

State v. *Winner*, 17 Kan., 298.

State v. *Rogers*, 54 Kan., 683; 39 Pac., 219.

Spies v. *People*, 122 Ill., 1, 229.

It is sufficient to say that this conspiracy is still pending, and will so continue as long as these suits to enforce the fraudulent contract are being prosecuted by this plaintiff.

Under legitimate application of the rule, the joint par-

ticipation of all the persons charged may be shown by a number of independent circumstances, each apparently isolated, disconnected and without significance until, when grouped together, they disclose the common purpose which has brought them all into existence. An unlawful combination is more generally proved by isolated and distinct circumstances, and, as said by the court, in *State* v. *Spalding*, *supra:* "In such case, it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination; but, when it is seen in connection with other acts, its true nature may be discovered." Clearly the true nature of these acts can never be discovered if each of them may be individually excluded because its relevancy is not immediately apparent. The principle and importance of the rule is not its advantage to one side or the other in making acts and declarations of one evidence against others, but in that it lets a number of apparently disconnected and detached facts fall into their true relations to each other; enables them to throw light and explanation upon each other; and to show *whether* they *are* detached or are *parts of a combined effort for a common purpose.* The acts of one person alone might not possibly produce the result actually seen, and the acts or declarations of one alone might be apparently without significance and unintelligible, but taken in connection with other acts or declarations of others they become clear, systematic and efficient in relation to the actual event. The evidence here under consideration was relevant and should have been admitted against the plaintiff, under the legitimate operation of the rule established by this court.

4.

Brown Affidavit.

This question is presented in the record at pages 1284–6, 1914, 1923, and by Assignment of Error No. 105, on page 2006.

The fifth section of the petition relates to the character, as evidence, of the affidavit or sworn statement of John H. Brown, which has in many aspects been always so important a factor in this case. Designated at different times by various names, namely the "affidavit," the "sworn statement," the "confession" of John H. Brown, it is found in its connection with the present question at page 1284 of the record. This sworn statement, executed on the 4th of September, 1879, was but the repetition in writing of a statement made orally by Brown to his attorney some months before at Lexington, in Missouri. (*Rec.*, 1230–8.) This statement of Brown was an acknowledgment verified by his oath that he and Levi Baldwin together with Hillmon had conspired to defraud the insurance companies by procuring policies upon Hillmon's life, with the purpose of collecting said insurance by falsely pretending the death of Hillmon and fraudulently presenting a fictitious body to the insurance companies, and that the body brought from Medicine Lodge to Lawrence and presented as the body of Hillmon was not the body of Hillmon, but a body falsely pretended to be his, in pursuance of that conspiracy. Subsequently, the same John H. Brown made a deposition, which the plaintiff read in evidence on the trial below, where he stated in substance that the above affidavit which had been made by him was untrue; and later in

the trial, during the cross-examination of a witness called by defendant, the *plaintiff offered* in evidence this affidavit or sworn statement, *generally and without any limitations upon its scope*, and it was so admitted without objection from defendant. (*Rec.*, 1284.)

In due time the defendant requested the court to give to the jury the instruction referred to in the petition. The court refused to give the instruction, to which refusal the plaintiff duly excepted (*Rec.*, 1914), and assigned error thereon in the Circuit Court of Appeals. (Assignment, 105; *Rec.*, 2006.) Having refused said instruction, the court instructed the jury in the language which is set forth in the petition on pages 17–18. A reference to the instruction requested, and to the charge, will show at a glance that both are upon the same identical subject, and are in direct opposition to each other, in that the *one* asks instruction to the jury that the affidavit *having been introduced in evidence by the plaintiff* should be considered evidence against her of the facts therein stated, and the *other*, namely the charge, instructed the jury that the statement was *not affirmative evidence* of the truth of any matter therein contained. The defendant having caref ully reserved exception to the ruling of the court in refusing the instruction asked for upon this subject, it was not then necessary by express decision of the Circuit Court of Appeals for the Eighth Circuit for the defendant to again except to that portion of the charge which embodied a contrary statement of the law. This rule had then been announced by express decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Long-Bell Lumber Company* v. *Stump*, 30 C. C. A., 260; 86 Fed., 574 582. In that case the opinion of the court, delivered by Judge PHILLIPS, with whom concurred Judge SANBORN, declared as follows:

"In *Evans* v. *Clark* (Ind. T.), 40 S. W., 771, it is held that where the applicant requested the giving of a proper instruction, which was refused, it is not necessary, in order to insist upon error of such refusal, that the party should have excepted to an inconsistent instruction given by the court. The court said:

'Where a party takes proper exception to any matter in the record, it is not necessary to take other exception, if the exception thus taken covers the matter in issue.'

While this is the language of the court of appeals of the Indian Territory, it is nevertheless valuable for the force of the reason assigned. See, also, *Guinard* v. *Knapp, Stout & Co.* (Wis.), 70 N. W., 671, where the court lays down the rule to be that the refusal to give a correct instruction is reversible error, unless it appears that the same was substantially given in the general charge. Having requested the court to give a proper declaration of law, and the court, by its refusal, having declared that it held the law to be otherwise, to which exception was duly taken, why should counsel be required again to except to the converse or modified declaration given by the court? It would be but a repetition of the objection already expressed in the first exception. And, so far from the silence of counsel at the first reassertion of the error by the court evidencing a waiver of the first error, it but evinces a respectful deportment by counsel towards the court, in refraining from repetitious objections at the ruling of the court, after having once taken exception involving in effect the same principle which would be represented in the second exception."

In the above case Judge THAYER dissented but without specific reference to the point in question. In the present case a precisely opposite position is taken by the majority of the court upon this subject. In its opinion the court said:

"We are *relieved, however, of the necessity of*

> *deciding* whether there was anything misleading in the excerpt from the charge which has been quoted above, *by the fact that no exception was taken* thereto, and we may reasonably infer from the fact that no exception was taken, that the direction given by the court that Brown's sworn statement to the defendant's attorney was not '*affirmative evidence*,' etc., was not deemed to be of much importance or as liable to mislead, when the case was submitted to the jury."

While it is plain that the language of the court in its instruction to the jury is in direct opposition to the rule of law asserted in the instruction refused by the Circuit Court, the Court of Appeals refused to consider the objection of the defendant to the rule of law expressed in the charge because separate and independent exception had not been taken to the charge itself. We submit that any criticism of language which would make the instruction asked by the defendants and the charge presented by the court otherwise than the precise antitheses of each other is verbal and without substantial foundation. The interpretation of the language of that instruction presented by Judge SANBORN in his dissenting opinion, and quoted in the petition, we submit to be correct and to state the manifest purport of the language employed. To the further considerations in this connection, which are fully presented in the petition, it is not necessary to recur in this argument.

5.

Impeachment of the Releases.

This question is presented in the record by exceptions appearing at pages 546, 576–581, 585, and by Assignments of Error Nos. 27–32, on pages 1945–1948.

A ruling of the court below, which seems to be opposed to the uniform decisions of this court, is presented by the SIXTH section of the petition.

The subject of this sixth section is the admission by the court below of evidence offered by the plaintiff to destroy the legal effect of certain releases to the defendant of the plaintiff's claims under the policies sued on, and which the plaintiff herself introduced in evidence. These releases were executed by the plaintiff at Leavenworth, upon full deliberation, in September, 1879, and the plaintiff went with them herself to the office of her counsel to procure the policies for surrender to the defendant (*Rec.*, 777, 825, 826, 830, 1244–6), and delivery of the policies to her was refused by her counsel on account of his own claim of interest in them, but she herself subsequently ratified and confirmed the releases. The releases on their face recited a consideration, and by the law of Kansas in their legal effect import a consideration. Section 7 of chapter 21 of the statutes of Kansas of 1868, then in force, provided as follows:

> "All contracts in writing, signed by the party bound thereby, or by his authorized agent or attorney, *shall import a consideration.*"

By construction of this statute by the Supreme Court of Kansas, the legal effect of instruments thus executed, in respect of their import of a consideration, is held to be the equivalent of that of bonds and other instruments under seal at common law.

Northern Kas. Town Co. v. *Oswald*, 18 Kas., 336, 339.

Sprague v. *Mo. Pac. Ry. Co.*, 34 Kas., 347, 353.

Vandervelden v. *Chi. & N. W. Ry. Co.*, 61 Fed., 54.

We cite the following from the opinion of Judge SHIRAS, in the case last cited:

> "The point presented for decision by the first ground of objection is whether, in an action at law, a written release of the character of that introduced in evidence can be impeached for fraud not inhering in the execution thereof, but which only goes to the extent of the consideration. * * * By sections 2112 and 2113 of the Code of Iowa, the use of private seals in written contracts, except in case of corporations, is abolished, and it is declared that all contracts in writing, signed by the party to be bound or his agent or attorney, shall import a consideration. Practically, the distinction existing at common law between instruments under seal and those not under seal is thus abrogated in Iowa. The execution of the release being admitted in the pleadings, no evidence is required on part of the defendant to sustain the defense based thereon. Being in writing, and its execution by the plaintiff being admitted, it imports a consideration, and therefore at law its validity is established."

Of this rule there can be no doubt nor any more that the court itself in the immediate connection had the subject and the rule definitely in mind, for in his charge to the jury he said:

> "While under the law the execution of the written instruments of release by the plaintiff *imports a consideration* therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration." (Rec., 1921.)

By the Supreme Court of the United States the rule is established: "That in an action upon a sealed instrument in a court of *law*, failure of consideration or fraud in the consideration for the purpose of avoiding the obligation is not admissible as between parties and privies to the deed." *Hartshorn* v. *Day*, 19 How., 211.

George v. *Tate*, 102 U. S., 564. In both of these cases the question came before this court upon *objection to the admission of evidence* As the objection goes to the very power of the court to entertain such a defense, it may be raised at any stage of the proceedings, and equally by demurrer or by objections to evidence, and such is the settled practice in the State of Kansas. *Goodrich* v. *Comm'rs. of Atchison County*, 47 Kan., 355, 357–8.

The defendant below, claiming the release executed at Leavenworth to be legally valid and effective, set it up in defense by pleading. The plaintiff, to avoid the effect of the release thus pleaded, deemed the burden of overcoming it to be upon her, and thereupon *offered it in evidence*, and in the same connection sought to impeach its legal effect. Repeated objections to testimony of this character offered by the plaintiff were overruled and the testimony admitted subject to numerous exceptions. Having once excepted to the court's ruling, it was "not desirable nor seemly for counsel to continually repeat their objections to the same class of testimony." *Salt Lake City* v. *Smith*, 104 Fed., 457, 470 (C. C. A., 8th Cir.)

Among the objections interposed was always the one of *incompetency*. At no time was there any ambiguity or uncertainty of any character as to the precise nature and kind of testimony against which this objection of incompetency was levelled. In more than one instance the inquiry of the court caused the plaintiff's counsel to state explicitly for what purpose the evidence was being offered (*Rec.*, 546, 576–80), and it was in connection with such explicit statements of the purpose of the plaintiff in offering the evidence and with specific objection of the defendants that the record shows the following:

"The defendants object to the question as *incom-*

> *petent*, irrelevant and immaterial, and *desire it understood that all testimony upon this subject is under their objection.* The court overruled the objection, to which action of the court the defendants at the time duly excepted and still except." (*Rec.*, 580.)

Although the record shows that there could have been no possible obscurity in the minds of either the court or of counsel as to the ground of objection and the particular character of testimony objected to as incompetent, it was urged in argument in the Court of Appeals that objection to evidence on the ground that it was incompetent, immaterial and irrelevant was not adequately definite to present the point that want of consideration and fraudulent inducement in procuring the execution of a sealed instrument, or of one in legal effect importing a consideration, are incompetent to be shown in a court of law.

In *Noonan* v. *Caledonia Mining Co.*, 121 U. S., 393, 400, Mr. Justice FIELD, discussing this general form of objection "immaterial, irrelevant and incompetent," stated the criticism which is suggested, and also its limitation. He said:

> "The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, *unless it be of such a character that it could not have been obviated at the trial.* The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time *if, under any circumstances, that can be done.*"

Accordingly in *Chapman* v. *Reynolds*, 77 Fed., 274, First Circuit, the court said:

> "Evidence objected to may sometimes be con-

sidered on appeal, although the objections were only generally expressed, if *in no event it could be made relevant*, and if, also, the objections to it are *not of a character which could have been obviated* if they had been stated."

It is obvious, therefore, that under the decisions of this court above cited (*Hartshorn* v. *Day*, 19 How, 211; *George* v. *Tate*, 102 U. S., 564), the ground of the objection was "*of such a charater that it could not have been obviated at the trial.*" That ground of objection was the subject-matter of the evidence—its inherent nature—and no "opportunity to obviate" the difficulty in this case could have availed the plaintiff under any circumstances.

Nor could the situation of the plaintiff in that respect be changed or helped by the provision, section 8, of the statute of Kansas, set out in the petition, p. 24. The following is the section:

> "Section 8. The want or failure, in the whole or in part, of the consideration of a written contract, may be shown as a defense, total or partial, as the case may be, in an action on such contract, brought by one who is not an innocent holder in good faith."

The law is well settled by this court that state statutes like this of Kansas, which may authorize equitable defenses to be interposed in actions at law in the state courts upon contracts executed in that state, do not extend to the courts of the United States nor confer such power upon them. A statute of Kansas cannot confer upon the courts of the United States power to entertain equitable defenses in an action at law.

Northern Pacific Railroad v. *Paine*, 119 U. S., 561.

Scott v. *Neely*, 140 U. S., 106, 110–111.

Scott v. *Armstrong*, 146 U. S., 499, 512.
Vandervelden v. *Chi. & N. W. Ry. Co.*, 61 Fed., 54.
Hill v. *Northern Pacific Ry. Co.*, 104 Fed., 754.

It seems inevitable, therefore, that the judgment of the courts below upon this subject must be in direct contravention of the decisions of this court.

6.

Lapse of Time as Evidence.

This question is presented in the record by an exception appearing at pages 1909–10, and by Assignment of Error No. 99, at page 2003.

The seventh section of the petition relates to the refusal of the Circuit Court to instruct the jury that the lapse of time since the alleged death of Hillmon was an immaterial matter in the case, and to the action of the court in charging the jury contrarywise, as quoted in the petition on pages 27 and 28.

The unexplained absence of a man from home and friends for more than seven years, during which no tidings of him have been received by those who if he had been living would naturally have heard from him, gives rise to the legal presumptions that the absentee continued to live during the first seven years of the absence, and that after that time he was dead. The presumption of death will sometimes arise upon a shorter absence, such as when at the time of disappearance the absentee was in desperate state of health, or was in imminent peril of his

life; *but in no case is there any legal presumption as to the particular time of death.* Moreover the presumption of death is a mere limitation of the presumption of the continuance of life, and can only arise in a case where there is an entire absence and dearth of proof upon the subject. Where there are facts and circumstances shown, sufficient in themselves to account for the absence, there is no basis for any legal presumption, and none arises, and the party asserting the death must establish it by affirmative proof. And apart from legal presumptions, it would seem to be clear that where evi dence is produced which standing alone exhibits a powerful motive for voluntary disappearance and concealment, no inference of fact as to death can be drawn from the absence. In such case there is no more basis for an inference of fact than for the presumption of law. *Then* the negative circumstance of absence has no probative force whatever—no logical or evidential value—upon the question whether that absence should be ascribed to death on the one hand or to the motive for concealment on the other. In the present case the only direct evidence of the killing of Hillmon on March 17, 1879, came from the mouth of Brown, who testified that he accidentally shot Hillmon; but Brown had previously made affidavit that it was not Hillmon at all who was killed, but that it was a man Hillmon had murdered with intent to have the body presented to the insurance companies as the body of Hillmon; and it was evident to all concerned in the trial that he, Brown, was not entitled to the slightest credence. Eliminating his testimony, all the evidence produced by the plaintiff tending to show that Hillmon died at the time and place alleged in her pleading, bore upon the *identity of the corpse* found at Crooked

Creek. In opposition to this the company not only introduced a mass of evidence which of itself was clearly sufficient to establish that the corpse was *not* that of Hillmon, but also gave evidence sufficient in itself to establish that the corpse was that of a man murdered by Hillmon in furtherance of the fraudulent conspiracy set up in the pleading. Upon plaintiff's evidence, standing alone, it appeared that Hillmon was killed as alleged; upon defendant's evidence, standing alone, it was indubitable that he was *not* killed as alleged, and that when last seen he was engaged in carrying out a criminal fraud, to consummate which murder and concealment were necessary. In this state of the proofs, the fact that Hillmon had not been seen nor heard from since March 17, 1879, could not serve as cumulative evidence in favor of either contention, for it was perfectly consistent with both. It became entirely immaterial upon the question of the identity of the corpse. It lent no more weight to plaintiff's assertion that Hillmon died at Crooked Creek than to defendant's theory that he was in that voluntary concealment which was necessary to the consummation of the fraud and conspiracy proved against him, and which was also necessary to avoid punishment for the murder done there by him.

In its charge upon this point (Petition for Certiorari, pp. 27, 28) the Circuit Court called the jury's attention to the legal presumption arising from seven years *unexplained* absence, though such a presumption was entirely foreign to the facts of the case, which exhibit no *unexplained* absence. The court then told the jury in the same connection that Hillmon's absence might be considered with the other evidence relating to his death as tending to show that he died at the time and place alleged by the plaintiff, subject to be weakened by

a motive, if any, for a voluntary concealment. The charge in effect asserted that the absence constituted evidence of the death as claimed, adding its weight to the sum total of plaintiff's evidence upon the point to be overcome by the defendant. The jury must have taken it to mean, especially in view of the misleading and unnecessary reference to legal presumptions, that the mere fact of absence was to be given a value and weight in favor of plaintiff's contention and against that of defendant, which it obviously did not have, and this in the minds of the jury may have turned the scales of the evidence and given the preponderance to plaintiff. The charge embodied a statement of law directly contrary to that contained in the instruction requested by the defendant, which was refused and duly excepted to (*Rec.*, 1909), and under the decision of the Court of Appeals in the Eighth Circuit of *Long-Bell Lumber Co.* v. *Stump*, 86 Fed., 574, it became unnecessary to except to the charge as given. It is submitted that the following authorities support the proposition that the requested instruction should have been given, and that the instruction as given was erroneous:

Davie v. *Briggs*, 97 U. S., 628.

N. W Mutual Life Ins. Co. v. *Stevens*, 71 Fed. Rep., 258; 18 C. C. A., 107.

Montgomery v. *Bevans*, 1 Sawyer, 660; 17 Fed. Cas., 628 (by Mr. Justice FIELD).

Cone v. *Dunham*, 59 Conn., 145.

Ray v. *Mut. Benefit Co.*, 174 Pa. St., 1; 34 Atl. Rep., 283.

Schaub v. *Griffin*, 84 Md., 557; 36 Atl. Rep., 443.

Whitely v. *Equitable Life Society*, 72 Mo., 170; 39 N. W. Rep., 369.

Seeds v. *Grand Lodge*, 93 Ia., 175; 61 N. W. Rep., 411.

In re Phene's Trust, L. R. 5; Chan. App., 139.

1 Taylor. on Evidence, Sec. 200.

1 Greenleaf on Evidence, Sec. 41.

Lawson on Presumptive Ev., pp. 251–298.

It is respectfully submitted that the Petition for Certiorari should be granted and the judgment of the Circuit Court of Appeals and of the Circuit Court be reviewed.

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